REPORTS

OF

CASES,

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

With Tables of the Names of Cases and Principal Matters.

By EDWARD HYDE EAST, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum. Hor.

VOL. IX.

Containing the Cases of Michaelmas, Hilary, and Easter Terms
In the 48th Year of Geo. III. 1807 and 1808.

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1808.

JUDGES

OF THE

COURT OF KING's BENCH,

During the Period of these REPORTS.

EDWARD Lord ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SOULDEN LAWRENCE, Knt.
Sir SIMON LE BLANC, Knt.
Sir JOHN BAYLEY, Knt.

ATTORNEY-GENERAL.

Sir VICARY GIBBS, Knt.

SOLICITOR-GENERAL.

Sir THOMAS PLUMER, Knt.

A

TABLE

OF THE

CASES REPORTED

IN THIS NINTH VOLUME.

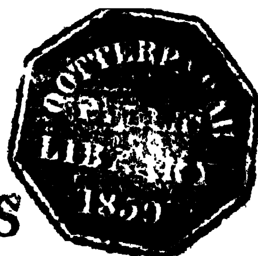
N. B. Those Cases which are printed in *Italics* were cited from MS. Notes.

Kemeys

ERRATUM.

In Vol. VIII. p. 568. lines 5 and 6. *for* "deviseable" *read* "divisible."

CASES



C A S E S

1807.

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN Vol IX.

Michaelmas Term,

In the Forty-eighth Year of the Reign of GEORGE III.

WM. ROBINSON *against* CHIPCHASE GREY, MARGARET ROBINSON, WM. GREY, and T. R. GREY.

One, having entered into articles of agreement for the purchase of certain premises, devised the same to a trustee to pay the rents and profits to her three daughters (one of them being covert), and the survivor of them, for their lives, share and share alike: and, after their decease, in trust for all and every the *child and children* of her three daughters who should be living at the death of the survivor of them, as tenants in common: but if all her daughters should die without leaving any *issue*, then after the decease of the survivor, in trust for her grandson in fee, who was her *heir at law*: the residue of her real and personal estate to her three daughters. Upon a bill filed by the grandson in the lifetime of the surviving daughter to restrain the tenant from cutting timber, &c.; and after a conveyance of the premises to the uses of the will; held that under the will and deeds of lease and release the three daughters took no legal estates, but that the releasee took an estate for the lives of the daughters; and that such of their children as should be living at the death of the survivor of the daughters would take estates *in fee* as tenants in common.

THE Master of the Rolls sent the following case for the opinion of this Court.

Margaret Robinson by her will, dated the 10th of *March* 1762, duly executed and attested, after reciting

 that

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that she had lately entered into articles of agreement with *J. Rosamond*, and *Henry Wastell*, clerk, for the purchase of several messuages and other premises in *High-street*, *Sunderland*, in the several occupations of *M. Harrison*, *Chipchase Grey*, and others named, as tenants thereof; which agreement had not been carried into execution; she thereby desired that her executrix after named should, as soon as conveniently might be after her decease, procure the said agreement to be carried into execution, and raise and pay the purchase-money out of her personal estate; (except the plate, china, household goods, and other furniture in her dwelling-house at the time of her death), or by sale or mortgage of the premises so purchased. The will then proceeded: "And I do hereby "give and devise the said messuages and other premises "so purchased as aforesaid to Lady *Ann Middleton*, her "heirs and assigns, upon the several trusts, and for "the uses, intents, and purposes following; viz. in trust, "first, *to pay the rents and profits* of the said premises *to* "*my three daughters*, *Elizabeth Robinson*, *Ann*, wife of "*Chipchase Grey*, and *Margaret Robinson*, and to the sur-"vivor of them, for their respective natural lives, to be "equally divided amongst them share and share alike. "And I order and direct that the share of my said daugh-"ter, *Ann Grey*, shall be paid into her own proper hands, "&c. for her separate use, and that her receipt, notwith-"standing her coverture, shall be a sufficient discharge "for the same. And from and immediately after the "decease of all my said daughters, the said premises and "the rents and profits thereof shall be in trust for all "and every the child and children, as well sons as daugh-"ters, of my said three daughters, *Elizabeth*, *Ann*, and "*Margaret*, who shall be living at the death of the sur-

"vivor

"vivor of my ſaid daughters, ſhare and ſhare alike; to "take as tenants in common and not as joint tenants. "But if all my ſaid daughters ſhall happen to die with- "out leaving any iſſue, then immediately from and after "the deceaſe of the ſurvivor of my ſaid daughters, in "truſt for my grandſon, *Wm. Robinſon*, his heirs and "aſſigns for ever. And my will is that the ſaid pre- "miſes ſhall be conveyed in purſuance of the ſaid agree- "ment to and for the ſeveral uſes, intents, and purpoſes "hereinbefore limited, expreſſed, and declared. Alſo I "give and bequeath to my ſaid daughters *Elizabeth* "*Robinſon*, *Ann*, and *Margaret Robinſon*, all the plate, "china, houſehold goods, and other the furniture, &c. re- "maining in my dwelling-houſe at the time of my death, "equally to be divided between them, ſhare and ſhare "alike. And as to all the *reſt and reſidue* of my *real* and "perſonal eſtate, whatſoever and wheresoever, or of what "nature or kind ſoever, I give and deviſe the ſame to "my ſaid three daughters, their heirs, executors, &c. to "be equally divided amongſt them, ſhare and ſhare alike; "ſubject nevertheleſs to the payment of all my juſt "debts, legacies, and funeral expences, which I hereby "direct to be paid thereout by my ſaid executrix. Pro- "vided nevertheleſs, that the ſaid ſeveral bequeſts to my "daughter *Elizabeth Robinſon* are not intended to be any "ſatisfaction to her for a debt of 100*l.* due from me to "her, and ſecured by bond dated the 9th of *March* "inſtant; which I will that ſhe ſhall receive out of my "eſtate and effects, over and above what is hereinbefore "given to her. And I appoint the ſaid Lady *Ann Mid-* "*dleton* ſole executrix of this my will," &c.

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The teſtatrix died on the 24th of *March* 1762, leav-

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ing the plaintiff, *Wm. Robinson*, her grandson and heir at law, and leaving also her said three daughters, her surviving. Lady *Ann Middleton* declined to act in the trusts of the will, and having renounced the execution thereof, by indentures of lease and release of the 12th and 13th of *February* 1767, made after her death, the said *Henry Wastell* and *John Rosamond* being seised in fee, and one *Wm. Middleton*, heir of the said Lady *Ann*, did, for the consideration therein mentioned, convey the premises in the will mentioned, in pursuance of the said agreement, unto the said *Wm. Robinson*, his heirs and assigns, to the uses following, viz. To the use of one *Adam Boulby*, his executors, &c. for the term of 2000 years, in mortgage, for securing 1028*l.* and interest as therein mentioned; and subject thereto, upon the trusts and for the intents and purposes declared concerning the same in the will of the testatrix *Margaret Robinson*. The said mortgage term of 2000 years has by divers mesne assignments become vested in *Chipchase Grey*. After making the said indentures of lease and release, *Ann*, wife of the said *Chipchase Grey*, and daughter of the testatrix, died, leaving two children, viz. the defendants *Wm. Grey* and *T. R. Grey*, her surviving; and *Elizabeth Robinson*, afterwards *E. Scott*, another of the testatrix's daughters, after the making of these indentures, also died without leaving any issue living at her death; and the defendant, *Margaret Robinson*, is the surviving daughter of the testatrix. *Chipchase Grey* has, by virtue of the said mortgage, and with the consent of *Margaret Robinson*, *Wm. Grey*, and *T. R. Grey*, been for many years in the possession of the demised premises, and has cut down timber, and otherwise committed waste thereupon; the said

said *Wm. Robinson* claiming to be entitled under the said will to the remainder in fee of the premises expectant upon the death of *Margaret Robinson*, *Wm. Grey*, and *T. R. Grey*. In *Michaelmas* term 1803, *Wm. Robinson* exhibited his bill in Chancery against *Chipchase Grey*, *Margaret Robinson*, *Wm. Grey*, and *T. R. Grey*, to have his right thereto declared and established by a decree of the said Court, and that *Chipchase Grey* might be restrained from cutting down timber and committing waste on the premises. To which bill the defendants appeared and put in their answer: and on the 19th of *March* 1805 the cause came on to be heard before the Master of the Rolls, when his Honor ordered that this case should be stated for the opinion of this Court upon the following question; "What estate and interest the testa-"trix *Margaret Robinson*'s three daughters, *Elizabeth* "*Robinson* spinster, *Ann Grey* wife of *Chipchase Grey*, "and *Margaret Robinson* spinster, and the survivor of "them, and their children, or such of them as should "be living at the death of such survivor, respectively "took under the said testatrix's will and the said inden-"tures of lease and release?"

This case was argued in *Trinity* term last, by *Abbott* for the plaintiff, and *Holroyd* for the defendants: when it was admitted that the use was executed in the trustee during the lives of the three daughters, *Elizabeth*, *Ann*, and *Margaret*; the trustee being directed to pay the rents and profits into the hands of the daughters and the survivor of them, one of whom also was a married woman; which could not be done, unless the trustee were entitled first to receive and take such profits; which carries the legal estate, according to *Jones* v. *Lord Say*

 and

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and Sele (*a*), and *Doe* v. *Simpson* (*b*). The queſtion therefore turned principally on the eſtate in remainder which the teſtatrix's daughters or their children might take by implication from the deviſe over being to the *heir at law* in a certain event only: aſſuming it to be clear that a legal remainder to the iſſue could not unite with a prior equitable eſtate for life to the daughters, ſo as to give them eſtates of inheritance in the firſt inſtance: and that the Court would not execute the uſe in the truſtee beyond what was neceſſary to give effect to the intention of the teſtatrix. And though at the time of making the will, the teſtatrix, having only an equitable, though a deviſable (*c*), intereſt in the premiſes contracted to be purchaſed, could not carve a legal eſtate out of it; yet the legal conveyance being afterwards made according to the truſts and uſes of the will, the queſtion came to be argued as if the terms of the will had been introduced into the deed; the legal eſtate paſſing by the deed, and the will operating in effect as a declaration of the uſes. However, it was agreed, at the requeſt of the Court, to relieve them from any difficulty in deciding on the deviſe of a mere equitable title, that the caſe ſhould be argued as if the teſtatrix had been ſeiſed in fee of the premiſes.

Abbott on the part of the plaintiff argued, that the children of the three daughters who happened to ſurvive all the three daughters (and ſuch only would take any thing)

(*a*) 8 *Vin. Ab.* 262. and vi. *Bagſhaw* v. *Spencer*, 1 *Veſ.* 144. and *Hartop* v. *Harton*, 7 *Term Rep.* 654.

(*b*) 5 *Eaſt*, 171.

(*c*) *Langford* v. *Pitt*, 2 *P. Wms.* 629. and vide 1 *Eq. Caſ. Abr.* 174. which collects the prior authorities.

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thing) took only eftates for life; 1ft, confidering only the words of devife to the children, without the limitation over to the teftatrix's grandfon *Wm. Robinfon*; 2dly, confidering the firft devife, with reference to the limitation over. 1ft, The devife is of "the *faid premifes*, and the *rents and profits thereof*, in truft for all and every the *child* and *children*, as well *fons* as *daughters*, of my faid three daughters, who fhall be living at the death of the furvivor of my faid daughters, fhare and fhare alike, to take *as tenants in common* and not as joint-tenants." There is nothing in the defcription of "the faid *premifes* and the *rents and profits* thereof" to fhew that any greater eftate than for life was intended to be paffed. There is not even fo ftrong a word as *hereditament*, which, however, in *Denn* v. *Mellor* (*a*), was held not to be fufficient to carry the fee. Nor are there any words of inheritance or limitation to carry a greater eftate than for life. Then, 2dly, the word *iffue* in the next claufe limiting over the eftate to the grandfon cannot enlarge the prior devife to the *children* of the daughters to which it refers: but it muft be taken to be there ufed fynonimoufly to children; in which fenfe it is fometimes ufed; as in *Goodright* v. *Dunham* (*b*), and *Doe* v. *Perryn* (*c*). [*Le Blanc* J. obferved that in thofe cafes the limitations were to the children *and their heirs*; and for default of *iffue*, then over (*d*).] But here there are no words of limitation in the prior devife to carry a fee to the children; and the Court cannot fupply them by conjecture of what the tef-

(*a*) 5 *Term Rep.* 558. 6 *Term Rep.* 175. 1 *Bof. & Pul.* 559. and 2 *Bof. & Pul.* 247.

(*b*) *Dougl* 264. (*c*) 3 *Term Rep* 484.

(*d*) Vide *Lewis* v. *Waters*, 6 *Eaft*, 336. and *Rex* v. *The Marquis of Stafford*, 7 *Eaft*, 521.

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tatrix might have intended, however hard the case may seem (a). The period contemplated by the testatrix was the death of the last of her daughters; if they left any children, then those children were to take, but for life only, for want of words to carry a greater estate: if there were no such children then living, the grandson was to take in fee.

Holroyd, on the part of the defendants, admitted, that if there had been nothing more in the will than the devise to the children living at the death of the survivor of the three daughters, the children would only have taken estates for life: but he relied on the subsequent limitation over to *Wm. Robinson*, who was the *heir at law* of the testatrix (a circumstance material to be considered) in default of issue of the daughters. And he contended, 1st, either that the three daughters would take estates for lives, as joint-tenants; remainder to their children for lives, as tenants in common; with a vested remainder in fee, or at least in tail, to the three daughters by implication: or, 2dly, that after such life estates, the children, as they came in esse, would take a vested remainder in fee by implication, liable to be devested as to such of them who died before the three daughters, or the survivor of them: or, 3dly, that the daughters would take a vested remainder in tail, after the life estates to them and their children; with a contingent remainder in fee to the children, as they came in esse; which would vest in such as were living at the death of all the daughters; which remainder was liable to be defeated by the particular event of the daughters dying, without leaving issue at the death of the survivor; in which event

(a) *Denn* v. *Bagshaw*, 6 *Term Rep.* 512.

only

only the eftate is given over to *Wm. Robinfon, the heir;* who would take either by contingent remainder, if the whole fee were not before difpofed of; or by way of executory devife in the particular event, if it were: or, 4thly, fuppofing that the whole eftate was not given over by implication to the daughters, or to their children, by the claufe referred to, that the three daughters would take the fee, as tenants in common, under the refiduary claufe, giving to them and their heirs, equally to be divided amongft them, fhare and fhare alike, the refidue of the real and perfonal eftate. The devife over to *Wm. Robinfon*, the heir at law, was not *generally*, but only in the particular event of there being no iffue of the daughters living at the death of the furvivor of them; and there was no occafion to devife the fee to him generally, in cafe none of the children furvived the daughters; for the law would have given it to him without the appointment of the teftatrix. But it is clear that in the event of the daughters' leaving children the teftatrix meant that it fhould not go to her heir at law; and therefore the daughters muft take fome larger eftate than for life; for unlefs they did, as the children were to take as tenants in common, upon the death of either, the fhare of that one would go over to the heir at law; but he was not to take in the event of there being any iffue left at the death of the furvivor of the daughters. By this the daughters would take a vefted remainder in fee, according to the doctrine in *Purefoy* v. *Rogers* (*a*), recognized by Lord C. J. *Willes* in *Moore* v. *Heafeman* (*b*). So in *Doe* v. *Clayton* (*c*), where the teftator devifed his eftate *at Eaton* to his grandfon, without any words of inheritance or limitation; yet this being accompanied with a prohibition to the hufband of his daughter and heir at law to

(*a*) 2 *Saund.* 388. *a*. (*b*) *Willes*, 143. (*c*) 8 *Eaft*, 141.

"come

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"come upon his premifes or hereditaments on any account whatfoever;" this was held to give a fee to the grandfon by implication. But certainly the daughters would not take lefs than a vefted remainder in tail, according to *Ives* v. *Legge* (*a*). The cafes of *Goodright* v. *Dunham*, and *Doe* v. *Perryn*, do not apply; for there the word *iffue* clearly applied to children: but if the children of the daughters had died leaving iffue, it could never have been the intention of the teftatrix that the limitation over to *Wm. Robinfon* fhould take effect. But if the daughters do not take a fee, their children muft, as *the heir at law* is at all events excluded if the daughters die leaving iffue. On the 4th point there are authorities to fhew, that the whole intereft of the devifor not before difpofed of may pafs by a refiduary claufe to one to whom an eftate for life was before given in the fame premifes; as *Hogan* v. *Jackfon* (*b*), and *Ridout* v. *Pain* (*c*).

In reply, it was urged, that as the daughters of the teftatrix were admitted to take equitable eftates for lives in the firft inftance, they could not take eftates tail by the limitation over in default of their *iffue*; which being a legal limitation could not coalefce with a prior equitable eftate for life. For the truftee takes the firft eftate; and therefore the limitation over is the fame in effect as if made in default of iffue of a ftranger, to whom no prior devife for life was made; and there is no cafe to fhew that an eftate tail can arife by implication from a devife over in default of the iffue of a perfon to whom no life eftate is before exprefsly given by the will. [*Lawrence* J. Was it not held otherwife in *Walter* v. *Drew*,

(*a*) 3 *Term Rep.* 488. in notis, and 1 *Fearn's Cont. Rem.* 554.

(*b*) *Cowp.* 299.

(*c*) 3 *Atk.* 493. and fee alfo *Camfield* v. *Gilbert*, 3 *Eaft*, 516.

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Drew (a), in the cafe of an heir at law ?] In *Moone* v. *Heafeman*, the devife over to the heirs of the mother, in cafe the daughters died before their mother, was to the fame perfon who took the intermediate eftate: but here *Wm. Robinfon*, though the heir of the teftatrix, was not neceffarily the heir of his aunts. And in *Doe* v. *Clayton* the conftruction arofe upon the different provifions of the whole will. Every eftate which any perfon can take on the death of the daughters having children muft be contingent, whether the children would take for life or in fee: for none of the children can take but in the event of their furviving the three daughters. At law the daughters themfelves can take nothing: on their death fuch of the children as are then living will take for life; or if none be then living, *Wm. Robinfon* will take a fee. Then if the firft remainder be contingent, every fubfequent remainder muft be contingent alfo, according to *Lodington* v. *Kime* (b).

The following certificate was afterwards fent to his Honor.

This cafe has been argued before us by counfel: we have confidered it, and are of opinion, that, under the will and the indentures of leafe and releafe, the three daughters of the teftatrix, *Elizabeth*, *Anne*, and *Margaret*, did not take any legal eftates; but that *Wm. Robinfon* the releafee in the indentures of leafe and releafe took, fubject to the term of 2000 years, an eftate for the lives of the faid three daughters, and the life of the furvivor of them; and that fuch of their children as fhall

(a) *Com. Rep.* 372. and vide *Target* v. *Grant*, per *Parker* C. 10 *Mod*, 403.

(b) 1 *Salk.* 24.

be

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be living at the death of the survivor of the said daughters of the testatrix will take estates in fee, as tenants in common, subject to the said term of years.

ELLENBOROUGH.
17th *June* 1807. N. GROSE.
S. LAWRENCE.
S. LE BLANC.

Saturday, Nov 7th.

GILES and Another *against* PERKINS and Others, Assignees of DICKENSON and Others, Bankrupts.

A customer paying bills, not due, into his bankers' in the country, whose custom it was to credit their customers for the amount of such bills, if approved, as cash, (charging interest), is entitled to recover back such bills in specie from the bankers becoming bankrupt; the balance of his cash account independent of such bills being in his favour at the time of the bankruptcy: and if payment be afterwards received upon such bills by the assignees, they are liable to refund it to the customer in an action for money had and received.

DICKENSON and Co. were bankers at *Birmingham*, with whom the plaintiffs had opened a banking account in 1804, which was continued down to the 18th of *November* 1805, when *Dickenson* and Co. stopped payment and became bankrupts. On the 12th of *November* 1805 the plaintiffs paid into the bank three bills to the amount of above 1100*l.*, which were indorsed by them, but were not due till *December* and *January* following; and at the time of the bankruptcy there was a considerable balance due to the plaintiffs' upon their cash and bills (due) account, independent of the three bills in question. It was stated to be the practice of this and other banking houses in the country, that when bills which were approved were brought to them by a customer, though the bills were not then due, if they had not a long time to run, they would enter them in a gross sum with cash, or paper which was immediately payable, to the credit of the customer; giving him either cash or liberty to draw upon them to that amount.

And

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GILES *against* PERKINS.

And the bankers ſo far conſidered theſe running bills (which were always indorſed by the cuſtomer) as their own, that they would, as convenience required, pay them away to other cuſtomers in the uſual courſe of buſineſs, or tranſmit them to their own correſpondents in *London*: and intereſt was charged on both ſides the account on ſuch paper tranſactions; and if the intereſt account turned out to be againſt the cuſtomer, the bankers alſo charged a certain commiſſion. Differing in this reſpect from the practice of bankers in *London*, who upon the receipt of undue bills from a cuſtomer do not carry the amount directly to his credit, but enter them ſhort, as it is called; that is, note down the receipt of the bills in his account, with the amount, and the times when due, in a previous column of the ſame page; which ſums when received are carried forwards into the uſual caſh column. In the preſent caſe the aſſignees of the bankrupts conſidering that the three bills in queſtion had been entered in the bank books in common with caſh, and that by the uſual mode of dealing the plaintiffs might have drawn for the amount before the bills were due, refuſed to deliver them up to the plaintiffs on demand; and as they became due the aſſignees received the money from the acceptors, to the credit of the bankrupts' eſtate: for which the plaintiffs brought their action for money had and received. And the queſtion was, whether they were entitled to receive back theſe bills in ſpecie from the bankrupts at the time of their bankruptcy, the ſame not being then due, though indorſed by them, and the balance of the caſh account being in favour of the plaintiffs; or whether they were only entitled to come in as creditors under the commiſſion for the whole amount of their banking account. Lord *Ellenborough* C. J. was of opinion, at the trial before

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Giles against Parker.

him at *Guildhall*, that the plaintiffs were entitlsd to recover; and they accordingly obtained a verdict for the amount of the bills.

Garrow and *Richardson* now moved for a new trial; relying on the course of dealing of country bankers who always entered approved bills at the usual short dates, as cash, and gave the customers the benefit of drawing upon them for the amount accordingly. And he referred to *Bent* v. *Puller* (*a*), where there having been a general bill account between two parties, one of whom became bankrupt, it was considered that the solvent party, in whose favour the balance was, could not maintain trover for the bills deposited by him with the other; they having been paid in on a general account, and not specifically appropriated to answer particular drafts which had not been paid by the bankrupt.

Lord Ellenborough C.J. Every man who pays bills not then due into the hands of his banker places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it pro tanto for his advance. The only difference between the practice stated of *London* and country bankers in this respect is, that the former, if overdrawn, has a lien on the bill deposited with him, though not indorsed; whereas the country banker who always takes the bill indorsed, has not only a lien upon it, if his account be overdrawn, but has also his legal remedy upon the bill by the indorsement;

(*a*) 5 *Term Rep.* 594. and vide *Buckler* v. *Buttivant*, 3 *East*, 72. Sed vide *Parke* v. *Eliason*, 1 *East*, 544. and *Finch* v. *Walker*, 2 *Blac.* 1154.

ment; but neither of them can have any lien on such bills until their account be overdrawn: and here the balance of the cash account at the time of the bankruptcy was in favour of the plaintiffs.

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GILES *against* PERKINS.

Per Curiam, Rule refused.

DOE, on the Demise of WEBB, *against* DIXON.

Monday, Nov. 9th.

Under a lease for 14 or seven years, the lessee only has the option of determining it at the end of the first seven years; every doubtful grant being construed in favour of the grantee.

THE defendant held the premises, for which this ejectment was brought, situated in *Cornwall*, as tenant at rack-rent, under a lease, the habendum of which was *for* 14 *or* 7 *years*. Notice was given by the landlord to determine the lease at the end of the first seven years; and the question was, whether by this mode of demise an option were reserved to the landlord, as well as to the tenant, of determining the lease at the end of seven years, or whether the tenant alone had such option. At the trial before *Lawrence* J. at *Bodmin*, there was cited, in support of the lessor's right to bring the ejectment at the end of the seven years, *Goodright* v. *Richardson* (a), where it was considered to be the intention of the parties under such a demise, that either might determine it at the end of the first period. And the rule of construction there laid down, it was said, was most consonant to the modern consideration of leases at rack-rent, regarding them as mutual contracts, equally beneficial to both parties, and not merely as grants from the lessors to the lessees; in which view the old rule of construction was applied to them, that every grant should be taken most strongly against the grantor and for the benefit of the grantee.

(a) 3 *Term Rep.* 462.

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Doe against Dixon.

On the other hand it was obferved, that this was not the point in judgment in that cafe, but an obiter opinion only: and that the contrary was decided in the fubfequent cafe of *Dann* v. *Spurrier* (*a*), which was a cafe fent by the Lord Chancellor for the opinion of the Court of C. B.; and underwent much confideration; and where it was finally held and certified, that on a leafe granted for 7, 14, or 21 years, the leffee alone had the option of determining it at the end of 7 or 14 years: and that went upon the old principle of law in favour of grantees, where the grant was doubtful. The learned Judge held himfelf bound by this laft determination, and nonfuited the plaintiff.

Lens Serjt. now moved to fet afide the nonfuit, and brought thefe conflicting authorities in review before the Court. But by

Lord Ellenborough C. J. All doubts which might at one time have exifted on the fubject are concluded by the decifion in the Court of Common Pleas, which was made upon full confideration of the cafe in this Court, and the antecedent authorities; and which proceeded upon the application to leafes of the general principle, that where the words of a grant are doubtful, they are to be conftrued in favour of the grantee: and that was certified to the Lord Chancellor, who muft be taken to have been fatisfied with the decifion,

Per Curiam, Rule refufed.

(*a*) 3 *Bof. & Pull.* 399. and 442.

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Doe, on the Demise of Ducket and Ladbroke, *against* Watts.

Tuesday, Nov. 10th.

Where ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the stat. 4 *H.* 7. *c.* 24. it is not necessary for the lessor to prove an actual entry to avoid such fine; considering it to operate only as a fine at common law: but by the defendant's confession of lease, entry, and ouster, the merits only of the lessor's title are put in issue

AT the trial of this ejectment before *Rooke* J. at *Warwick*, the lessors of the plaintiff shewed a *primâ facie* title. The defendant, who claimed under her late husband's will, having confessed lease, entry and ouster, gave in evidence a fine sur cognizance de droit, &c. levied by her husband before his death, as of last *Easter* term, with proclamations, of which one proclamation was made on the 8th of *May* in that term, and another on the 16th of *June* in *Trinity* term; but the plaintiff having served his declaration on the 23d of *May*, one proclamation only had been made before the commencement of the suit. But no actual entry had been made by the lessors to avoid the fine: and the question was, whether such entry were necessary to maintain the action? The learned Judge held, that as the four proclamations had not been made, the fine was not so far complete as to render an entry necessary by one who had title previous to the bringing of the ejectment; and therefore the plaintiff obtained a verdict.

Balguy moved to set aside the verdict on the ground of the Judge's misdirection in law: for that the effect of a fine at common law is to devest all the prior estates, which can only be revested again by entry, or by judgment in a real action (*a*). Then the stat. 4 *H.* 7. *c.* 24., which superadds the proclamations, does not alter the effect of the fine at common law in that respect (*b*). Therefore, though the fine in this case could not operate as a fine

(*a*) Vide *Plowd.* 357. (*b*) *Goodright* v. *Forrester*, 8 *East*, 565.

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Doe *against* Watts.

with proclamations, fo as to bar ftrangers within 5 years; yet ftill it would have the effect of a fine at common law, and confequently an entry would ftill be neceffary to avoid it and reveft the old eftate. It is true that in *Jenkins* d. *Harris* v. *Prichard* (*a*), it was faid that an actual entry was not neceffary to avoid a fine without proclamations: but that was not the principal point in judgment; but only a fecondary point, which became unneceffary to be decided, as the Court were clear that the leffors of the plaintiff had no title. And it feems not to have been argued at the bar, or much confidered by the Court. It is contrary to principle; and *Plowden* 265., which is referred to in the margin of the Reporter, fo far from fupporting the pofition, rather bears againft it: for there it was confidered that the ftat. 4 *H.* 7. *c.* 24. did not alter the form or fubftance of the fine at common law, but only enabled the party to add proclamations to it for another purpofe: and, therefore, though any of the proclamations upon a fine, according to that ftatute, fhould be erroneous, as if made on a *Sunday*, it would not avoid the fine itfelf, which would ftill operate as a difcontinuance at common law.

Lord Ellenborough C. J. The ftat. 4 *H.* 7. makes a fine with proclamations a bar, faving the rights of perfons who purfue them by *action* or *lawful entry* within a certain time. In *Oates* v. *Bridon* (*b*) Lord *Mansfield* faid

(*a*) 2 *Wilf.* 45.

(*b*) *Bull. N. P.* 103. Vide S. C. 3 *Burr.* 1897. where Lord *Mansfield's* expreffion is more general, that to avoid *a fine* there muft be an actual entry, &c. and that in *all other cafes* the confeffion of leafe entry and oufter is fufficient: without adverting to the diftinction, as in the note in the Law of Nifi Prius, between a fine *with proclamations*, and a fine at common law. See alfo *Goodright* v. *Cator*, *Dougl.* 478. and *Smith* v. *Clyfford*, 1 *Term Rep.* 741.

6 that

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that the confeffion of leafe, entry, and oufter, was fufficient in all cafes except in the cafe of a fine *with proclamations*, in which cafe it was neceffary to prove an actual entry. The entry therefore previous to the bringing of an ejectment is only neceffary by the words of the ftatute fo far as refpects a fine with proclamations; an *ejectment* not being confidered as an *action*, within the meaning of it. So is the cafe of *Jenkins* v. *Pritchard* (*a*); and the practice ever fince has been in conformity with that decifion. And when it is faid in feveral cafes that an entry is neceffary before ejectment brought to avoid a fine, it muft be underftood of a fine with proclamations (*b*). The point, therefore, having been fettled in thefe cafes, there feems to be no ground for difturbing it.

Per Curiam, Rule refufed (*c*).

(*a*) 2 *Wilf.* 45.

(*b*) *Berrington* v. *Parkhurft*, *Andr.* 125. and 2 *Stra.* 1086. was the cafe of a fine with proclamations, as appears from the argument.

(*c*) The refolution in this cafe is contrary to the decifion of *C. B.* in *Tapner d. Peckham and Others* v. *Merlott and Another*, *Willes*, 177; which was not referred to upon this occafion, nor noticed in the cafes of *Jenkins* v. *Prichard*, and *Oates* v *Brydon*, though prior to both in point of time. Ld. C. J. *Willes* there faid, that the Court would not determine whether the fine there was to be confidered as a fine with proclamations, or not; the action having been brought before the time when all the proclamations were expired; and all the proclamations having been made that could be made before that time: becaufe it was clear that it was a fine of one fort or another; and there was no pretence to fay that the fine was void. And if not void, all the Court were of opinion, that when a perfon in poffeffion levies a fine of any fort, the parties out of poffeffion cannot maintain an ejectment without an actual entry. Lord *Kenyon* alfo, in *Compere* v. *Hicks*, 7 *Term Rep.* 732. obferved, that in *Berrington* v. *Parkhurft*, as reported in *Andrews*, 136. Lord *Hardwicke* faid that in the cafe of a fine, the party had no title before entry; *not on account of the ftat. of H. 7.*, but on account of the puiffance of a fine at common law.

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On the other hand, the neceffity of an entry, before ejectment brought, to avoid a fine feems in other cafes, prior to thofe, to have been put upon the ground of the ftat. of *H.* 7. in relation to a fine with proclamations; as in *Lutterel*'s cafe, *Moor*, 450.; and in *Awdley*'s cafe, *ib.* 457. where it is faid that the ftatute is to be conftrued ftrictly, being made for the fecurity of titles. Alfo at common law it was neceffary to enter for a condition broken; but in *Little* v. *Heaton*, 1 *Salk.* 259. (which was endeavoured to be diftinguifhed from the cafe in *Willes*) an entry was held not be neceffary before the bringing of the ejectment. And the opinion of Lord C. J. *Hale* was referred to, who in an ejectment tried before him at the affizes in *Bucks* had held that the confeffion of leafe, entry, and oufter, was fufficient; in which opinion all the Judges afterwards concurred with him upon a cafe referved. And fubfequent refolutions to the fame effect were alfo referred to. It is true that the confeffion of leafe, entry, and oufter, as was obferved by Lord C. J. *Willes*, is, as to the *entry*, a confeffion of the *entry* of the leffee, and not of the leffor, in ejectment: but it muft alfo be recollected that by the ancient practice, to fuperfede which the rule for confeffing leafe, entry, and oufter was made in the time of Lord C. J. *Rolle*, (*Runnington* on Ejectment, 14.) leafes to try title in ejectment were actually fealed and delivered on the land itfelf; and confequently the leffor muft have entered upon it before, in affertion of his title: becaufe, fay the books, it was maintenance in any one who was out of poffeffion to convey to another. And indeed where the righful owner was diffeifed there might be fome rifk of his failing in his ejectment, if he had merely entered and afterwards executed a leafe off the land; for the diffeifee continuing in, or immediately after regaining, poffeffion, would have operated as a new diffeifin, and confequently as a re-diffeifin of the leffor at the time of executing the leafe. Then there is nothing in the ftat. 18 *Ed.* 1. *ft.* 4. de modo levandi fines, which requires that an entry fhall be made on the land in order to avoid the fine; though it concluded thofe who had right if they made not their claim of their action within a year and a day *fur la pie*; that is, *upon the foot of the fine*; and not *by the country*, as it is tranflated in *Runnington*'s edition of the Statutes, and other books; as if it had been written *pays* inftead of *pie*. Vide 2 *Bla. Rep.* 994. But Lord *Coke* feems to confider the ftat. of *Ed.* 1. as repealed by that of *H.* 7. fo far as to render an entry of the party's claim at the foot of the fine unavailable at this day. Certainly it muft be unavailable againft a fine levied with proclamations according to the latter ftatute. And fince the ftat. 21 *Jac.* 1. *c.* 16. the party having a right of entry has 20 years within which to make his entry after his right accrues: but by ftat.

2 Inft. 518. and vide Serjt. *Williams*'s Note on *Clarke* v. *Pywell*, 1 *Saund.* 319. *c.*

4 *Ann.*

4 *Ann. c.* 16. *f* 16. no claim or entry on lands shall be of any force or effect to avoid any fine levied *with proclamations*, or shall be a sufficient entry or claim *within the statute of* James 1. unless an action shall be thereupon commenced within one year after, &c. and prosecuted with effect. Upon the whole it seems now that for every purpose, except that of avoiding a fine *with proclamations*, in which case the stat. of *H.* 7. requires an *entry*, the bringing of an ejectment will serve the same purpose; and indeed, if the good sense of the thing is to be regarded, it seems better adapted to answer any useful purpose for which an actual entry on the land was originally required, or can at this day be made. But if the confession of the *lease* made by the lessor in ejectment be evidence of an admission on the part of the defendant, that the lessor had made an actual entry on the land before or at the time of making the lease, in order to enable him lawfully to make it; it should seem, while the matter was res integra, that the same evidence might have been applied to a fine levied with proclamations under the statute of *H.* 7. without doing violence to the words of that statute.

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DOE *against* WAITE.

DONOVAN, Assignee of KENNETT, an Insolvent Debtor, *against* DUFF, Assignee of the same KENNETT under a Commission of Bankrupt.

Tuesday, Nov. 10th.

THIS was an action for money had and received by the defendant to the plaintiff's use, the proceeds of property belonging to the bankrupt which had been disposed of by his assignee under the commission. The bankrupt had no certificate. The plaintiff became a creditor of his after the commission sued out, and subsequently took an assignment of his effects under the last insolvent debtors' act: and after the bankrupt had made application to the Great Seal to supersede the commission, (on which an issue was directed to try the validity of it,

Neither the bankrupt, nor any person claiming from him by assignment subsequent to the commission of bankrupt, shall be permitted in an action at law to question the validity of such commission, and recover from assignees the property of the bankrupt taken under it, by proving an act of bankruptcy committed by the bankrupt prior to the petitioning creditor's debt; though it be also shewn that there was a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy, whereon a better commission might have been sued out.

 but

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DONOVAN *against* DUFF.

but on which no further proceeding was had;) the plaintiff now brought this action; and in answer to the defendant's proof of a petitioning creditor's debt, an act of bankruptcy, and the commission regularly sued out thereupon under which he was chosen assignee, the plaintiff called the bankrupt to prove an act of bankruptcy prior to the petitioning creditor's debt, in order to invalidate the commission; and also offered proof of a good petitioning creditor's debt existing at the time of such prior act of bankruptcy, whereon a new commission might be sued out. But Lord *Ellenborough* was of opinion, at the trial at the last sittings at *Westminster*, that it was not competent for the bankrupt himself, or any person standing in his situation, like the plaintiff, to controvert the claim of his assignees under a commission regularly sued out, by shewing a prior act of bankruptcy; however such a defence might be set up by a debtor of the bankrupt resisting a claim made by the assignees under the commission against him; as it opened a great door to fraud; and there was another and more proper method pointed out by the statutes for the bankrupt to obtain redress, by application to the Great Seal to supersede a commission improperly issued against him. The defendant therefore obtained a verdict.

Marryat now moved for a new trial, and referred to the class of cases where commissions of bankrupt have been considered to be nugatory, on trials at nisi prius, upon proof of a prior act of bankruptcy, and a sufficient petitioning creditor's debt at the time whereon to support a commission. *Doe* v. *Boulcot* (a), *Toms* v. *Mytton* (b),

(a) 2 *Esp. N. P. Cas.* 595. (b) 2 *Stra.* 744.

and *Bingley* v. *Maddison* (*a*). And if a debtor of the bankrupt may object to the claim of the assignees suing for the property of the bankrupt, on account of proving an act of bankruptcy prior to the petitioning creditor's debt, there seems no reason for precluding the bankrupt himself, or any person claiming from him subsequent to the commission, from availing himself of the same objection. The objection goes to the validity of any debt contracted after an act of bankruptcy, as proveable under a commission founded upon such act of bankruptcy: and this is supported by several acts passed to make debts of a certain description so proveable: as the stat. 7 *G.* 1. *c.* 31. making bills, &c. payable at a future day, proveable under a commission sued out on a prior act of bankruptcy: the stat. 5 *G.* 2. *c.* 30. *s.* 22. enabling such bills, &c. to be a sufficient petitioning creditor's debt: and lastly, the stat. 46 *G.* 3. *c.* 135., which enables bonâ fide creditors, without notice, to prove their debts under any commission of bankrupt, notwithstanding any prior secret act of bankruptcy. [Lord *Ellenborough* C. J. The existing commission can only be cut down by shewing that another better commission may be taken out; and that can only be done by shewing not only an act of bankruptcy antecedent to the present petitioning creditor's debt, but also a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy.] That was shewn. [Lord *Ellenborough* C. J. Still, the only effect of that was to shew that *some other person*, as assignee under a commission to be sued out upon such prior act of bankruptcy, would have a better title than the defendant: but it does not prove that *the plaintiff* has a better right.] In the mean time, and until another valid commission

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DONOVAN *against* DUFF.

(*a*) *B. R. Mich.* 1783, *Co. Bankt. Laws, ch.* 2.

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was sued out, the right to the property would be in the plaintiff by assignment from the bankrupt.

Lord ELLENBOROUGH C. J. That brings it to the original question again, whether *Kennett* himself could have maintained this action against his assignee under the commission of bankrupt, by evidence that he had committed a prior act of bankruptcy; for his assignee subsequent to the commission cannot be in a better situation than himself. I know of no instance where such proof has been admitted on the part of the bankrupt and for his benefit against the assignees under the commission: but I know that in a case before Lord *Loughborough* when Chief Justice of the Common Pleas, he refused to permit a bankrupt, in an action against his own assignees under the commission, to prove a prior act of bankruptcy, in order to defeat the title of the assignees: and indeed it would be pregnant with enormous mischief to suffer it. If the bankrupt be aggrieved by the commission sued out against him, he may apply to the Great Seal for relief, which the statutes have authorized the Lord Chancellor to administer. But here we have it admitted that such an application has been made; and not succeeding there, it is now attempted to question the commission in this collateral objectionable shape, after the bankrupt himself has acquiesced in it, and after an ineffectual attempt to impeach it directly before the proper tribunal.

LAWRENCE J. If this were permitted to be done, it would place every assignee of a bankrupt in a dreadful situation. For then, after a commission had been sued out upon a clear act of bankruptcy proved, to which the bankrupt submitted, without question, at the time; and after

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after his property had been collected and diftributed under that commiffion; it would be in the power of the bankrupt, if it were competent to him to adduce fuch evidence, by bringing an action for money had and received againft his affignees, and proving a fecret act of bankruptcy prior to the petitioning creditor's debt, to recover from his affignees the whole amount of his property after diftribution.

The other Judges concurred in refufing the Rule.

The KING *againft* SWEET.

Wednefday, Nov. 11th.

In an order of filiation and maintenance the juftices have no power by the ftat. 18 *Eliz.* c. 3. to direct the defendant to pay the cofts of the parifh in obtaining the order: but having in fuch order feparated the fum to be paid for maintenance, and the fum to be paid for cofts, the order was quafhed as to the latter, and confirmed as to the reft of it.

AN order of filiation, made at the quarter feffions for the county of *Surry*, ftated that

" *Whereas it appears to this Court*, as well on the complaint of the churchwardens and overfeers of the poor of the parifh of *Saint Mary, Newington*, in the county of *Surry*, as on the oath of *Elizabeth Kenrick*, fingle woman, that fhe the faid *E. K.* on 13th *May* 1805 was delivered of a male baftard child in the faid parifh of *Newington*, and that the faid child is now chargeable to the faid parifh and likely fo to continue: and further, that one *Jofeph Sweet* did beget the faid child, &c. And whereas the faid *J. S.* hath been duly fummoned to be and appear before this Court, and hath been now heard, &c. but no fufficient caufe hath been fhewn why he fhould not be adjudged the reputed father of the faid child: now (upon hearing counfel on both fides, examination of witneffes upon oath, and the premifes fully confidered,) *it is adjudged* by this Court that the faid *J. Sweet* is the *reputed father* of the faid child: and it is ordered, as well for the better

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The King *against* Sweet.

better relief of the ſaid pariſh of *Newington* as for the ſuſtentation of the ſaid child, that the ſaid *J. S.* ſhall and do forthwith upon notice of this order pay or cauſe to be paid to the churchwardens, &c. of *Newington*, &c. 11*l.* 6*s.* 6*d.* for and towards the lying in of the ſaid *Elizabeth Kenrick*, and the maintenance of the ſaid child to the time of making this order; *and the further ſum of* 12l. *for the coſts of the ſaid pariſh in and about the obtaining of this order.* And it is further ordered, that the ſaid *J. S.* ſhall likewiſe pay to the churchwardens, &c. of *Newington*, &c. 3*s.* 6*d.* weekly, &c. during ſo long time as the ſaid child ſhall be chargeable to the ſaid pariſh of *Newington.*"

Two objections were made to this order; 1ſt, that there was no ſufficient adjudication of the birth of the baſtard child in the pariſh of *Newington*, but only a recital of that fact. 2dly, That the Seſſions had no juriſdiction to award the payment of coſts.

Garrow ſhewed cauſe in ſupport of the order. As to the firſt objection; it is ſufficient that the fact of the baſtard's birth in the pariſh is recited by the juſtices as appearing to them upon the complaint of the pariſh officers and upon oath; and unleſs that were proved the juſtices could not have made the order on the defendant as the putative father. *Rex* v. *Graveſend* (*a*), and *Rex* v. *Moravia* (*b*), are in point. And the ſame conſtruction was made in *Rex* v. *Fox*, *Tr.* 29 & 30 *G.* 2., cited by Lord *Kenyon* from his own MS. in *Rex* v. *Price* (*c*); both of which orders were in the ſame form, in this reſpect, as the preſent. The caſe of *The King* v. *Moravia* furniſhes

(*a*) *E.* 15 *G.* 2. MS. 1 *Conſt's Bott*, 437. *pl.* 595.
(*b*) *Ib. pl.* 596. (*c*) 6 *Term Rep.* 148.

nishes an answer to the second objection also; for there a sum in gross adjudged to be paid "for the maintenance of the child *and other incident charges and expences*" was held well: and as the *costs* which the parish are put to in securing the reputed father and obtaining the order against him would fall under that general description, there can be no objection in stating the charge for *costs* in the order. The case of *The King* v. *Skinn* (*a*) may be cited as an authority the other way; but that only goes the length of shewing that the Sessions cannot delegate to the clerk of the peace the power of taxing the amount of the costs awarded by them. And *Rex* v. *Nelson* (*b*) is an express authority that the Court have a power of awarding costs upon an order of filiation; supported as the report is by the original order for costs made in that case (*c*).

(*a*) *E.* 15 *G.* 2. MS. 1 *Const's Bott*, 421. *pl.* 552. (*b*) 1 *Ventr.* 37.

(*c*) Die *Veneris* prox. post. 15. *Sanctæ Trinitatis*, anno 21° *Car.* 2di Regis.

NORTHTUSH, REX *v.* BENJ. NELSON. } Ordinatum est quod defendens inveniat securitatem pro manutenentiâ spurii per ipsum nuper geniti super corpus *Elizabethæ Barrett*; et similiter pro indemnificatione parochianorum de *Orten* in comitatu prædicto ab eodem spurio. Et quod idem defendens solvit omnia *custagia* et expensa quæ iidem parochiani expenderunt in et circa manutenentiam prædicti spurii, et prædictæ *Elizabethæ Barrett*, tempore incubationis ejusdem *Elizabethæ*. Necnon quod idem defendens solvit prædictis parochianis omnia *custagia* et expensa quæ iidem parochiani expenderunt *in et circa defensionem et prosecutionem ordinis* per justicios pacis comitatus prædicti facti versus defendentem pro manutenentiâ prædicti spurii *a tempore quo ordo* illa sic facta fuit. Et quod *Thomas Fanshaw Miles* interim attendatur cum comptis custagiorum et expensorum prædictorum parochianorum sic (ut prefertur) expositorum, et quod idem *Thomas Fanshaw* certificabit curiæ hic superinde.

Ex motione Mr[i] *Lovell*,

Per Cur.

Lawes,

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The KING *against* SWEET.

Lawes, in fupport of the firft objection, referred to *Rex* v. *Cuddington* (*a*) as in point, that the order fhould ftate that the baftard was born in the parifh to which the relief was ordered; which was not cited in *Rex* v. *Gravefend*, and *Rex* v. *Moravia*. [The Court obferved, that it did not appear in that cafe what the form of the order was: the fact might no where have appeared in the order.] In *Rex* v. *Butcher* (*b*), where the order ran; "We *A.* and *B.*, two juftices, &c. refiding within the limits where the parifh church is, *within which parifh the child was born*, do," &c.; it was held not to be a fufficient averment that the child was born in the parifh to which the relief was ordered. [*Per Curiam.* The objection there was of another fort, viz. that it did not appear that the parifh ordered to be relieved was the fame parifh where the child was born.] Secondly, The Seffions have no jurifdiction to award cofts in any cafe except by ftatute; and none of the ftatutes (*c*) touching baftards give the juftices fuch a power. In *Rex* v. *Moravia*, the objection was to the generality of the charges and expences as incident, not to the obtaining the order of filiation, but to the *maintenance of the child*, of which the cofts of obtaining the order could form no part: and even that did not pafs without great doubt. And the order for cofts referred to in *The King* v. *Nelfon* was an order of *this Court*, and not of the Seffions; which was probably made upon the particular circumftances of the cafe attending the removing of the orders by certiorari; and refts altogether upon the general difcretionary power of the Court in all cafes where an improper ufe is made of

(*a*) *E.* 9 *Ann.* 1 *Conft's Bott*, 434. *pl.* 583. (*b*) 1 *Stra.* 437.

(*c*) 18 *Eliz. c.* 3. 7 *Jac.* 1. *c.* 4. 3 *Car.* 1. *c.* 4. 13 & 14 *Car.* 2. *c.* 12. 6 *G.* 2. *c.* 31. and 49 *G.* 3. *c.* 82.

their procefs. And the cafe of *The King* v. *Skinn* is an authority, as far as it goes, to fhew that the Seffions have no power to award cofts. [*Grofe* J. ftated, that he felt a difficulty upon the words of the ftat. 18 *Eliz.* *c.* 3. *f.* 2. which directs the juftices to "take order, as well for the punifhment of the mother and reputed father of fuch baftard child, as alfo for the *better relief* of every fuch *parifh* in part or in all." And unlefs the magiftrates below had a power of directing the cofts of obtaining the order to be paid, fo far from the parifh being relieved, it might in fome cafes be burthened ftill more than before.] The fame might be faid in the cafe of other orders made by juftices of the peace; but except in certain cafes where a power to award cofts is exprefsly given, it never was confidered that fuch a power was incident to the power of making the order for the relief of the parties aggrieved. There is no common law jurifdiction even in this Court to give cofts upon procefs; but it is given by different ftatutes.

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The KING *againft* SWEET.

LE BLANC J. obferved, that at any rate Mr. *Lawes* could only pray that fo much of the order as directed the payment of the 12*l.* for cofts fhould be quafhed. In anfwer to which he fuggefted, that the order being one and entire could not be divided. But the learned Judge faid, that the juftices themfelves had feparated the fums in their order.

Lord ELLENBOROUGH C. J. The firft objection made is, that there is no adjudication of the parifh where the child was born: but when the order ftates, that whereas *it appears* to the juftices on the oath of the mother that *fhe was delivered of the child in the parifh of* Newington; we

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we muſt underſtand it as an affirmative propoſition by the juſtices that the fact was ſworn to by the mother before them, and that they find it to be true; for they proceed upon that ground to adjudicate that the defendant is *the reputed father*, and that for the better relief of that pariſh he ſhall pay ſuch and ſuch ſums: and by the ſtatute, giving relief in this caſe, the reputed father is only bound to pay ſuch relief to the pariſh in which the baſtard child is born. And there is no caſe where an order in this form has ever been held to be bad; for in *The King* v. *Butcher*, which was ſuppoſed to come neareſt to this, the ambiguity was of another ſort. Secondly, it is objected that there is no expreſs power given by any of the ſtatutes to the juſtices to award *coſts* in this matter; and that, without that, they have no ſuch power. The only words of the ſtat. 18 *Eliz.* relied on are, that the order is to be made for *the better relief* of the pariſh; which it is ſaid, cannot effectually be relieved, without ſuch a power. But there does not appear to be any inſtance from the paſſing of the ſtatute to the preſent time when the juſtices have awarded coſts: the only caſe which has been found ſeeming at all to bear the other way is that of *The King* v. *Nelſon*: but upon looking into it more accurately, it appears that the award of the coſts there to be paid was by the order of this Court upon the removal of the original order by certiorari; and thoſe it is evident were coſts incurred ſubſequent to the making of the original order, by the very terms of it. Under what particular circumſtances thoſe coſts were awarded does not appear, as there is no recital of the matter in the order itſelf. The caſe of *The King* v. *Skinn* may indeed be open to the anſwer which has been given, that at any rate the Seſſions could not delegate the power of taxing the coſts: otherwiſe it would bear againſt the

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the power contended for. In *The King* v. *Moravia* the queſtion turned on the generality of the award of "*incident* charges and expences:" but the charges and expences there meant were ſuch as were *incident to the maintenance of the child.* There is therefore no caſe which enables us to put the conſtruction contended for on the words of the ſtatute of *Elizabeth*, as giving the juſtices authority to award coſts in this caſe. Then let us look to the reaſon and view of the ſtatute itſelf to ſee if ſuch muſt have been the intention of the Legiſlature; for it might not be too late even now to put a right judicial conſtruction upon it, if a wrong conſtruction had been put upon it by uſage. But there is nothing appearing in the ſtatute which neceſſarily requires ſuch a power to be given to the juſtices: the miſchiefs recited are the charges of keeping the baſtard children, and the evil example of others; for each of which a particular remedy is given; the one by making an order for the charges already incurred by the pariſh on account of the child, and for its future maintenance; the other by the puniſhment of the lewd mother and reputed father. Therefore neither in expreſs terms, nor by fair inference is there any power given to the juſtices to order the coſts of obtaining the order to be paid by the defendant: the order therefore is bad pro tanto; but it is good for the reſt, as the juſtices have diſtinguiſhed how much was given for maintenance, and how much for coſts. And this very caſe ſhews the inconvenience which would ariſe from extending the power of the juſtices in this reſpect; for much additional expence has been incurred by going to the Seſſions to get an original order of filiation, inſtead of applying to two magiſtrates near at hand.

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Grose J. I ſtill feel a difficulty in ſaying that the juſtices may not direct the defendant to pay the coſts of the pariſh obtaining the order. It is true that the expences may be improperly enhanced by going in the firſt inſtance to the Quarter Seſſions, inſtead of applying to two neighbouring juſtices, where that may be done; but of that the juſtices will judge in conſidering the quantum of coſts. But as the Seſſions have an original juriſdiction in this matter, and the words of the ſtatute of *Elizabeth* being, that the juſtices ſhall take order "*for the better relief of every ſuch pariſh in part or in all*;" and this being a remedial law; it did appear to me that the juſtices had a power of directing the fair and neceſſary expences of the pariſh in obtaining the relief granted to be paid to them; otherwiſe, ſo far from taking order for their better relief in part or in all, the pariſh may in ſome caſes be more burthened by the expence of obtaining the order than by the maintenance of the child. However, as my Lord and my Brothers have no doubt upon the ſubject, it muſt be preſumed that they have put the right conſtruction on the ſtatute.

Lawrence J. I agree with my Lord in the conſtruction he has put upon the ſtatute of *Elizabeth*: it recites two miſchiefs; the one, that the baſtards are left to be kept at the charges of the pariſh where they are born; the other, the evil example and encouragement of lewd life: and it directs that the juſtices ſhall take order as well for the puniſhment of the parents, as alſo for the *better relief* of the pariſh. Now theſe latter words being general, we muſt collect what relief the Legiſlature intended by adverting to the miſchief before recited, which

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was that the pariſh was left burthened with the charges of keeping the child: this cannot include the coſts to be afterwards incurred in obtaining the order of filiation and maintenance. But if the words were more doubtful than they are; yet after ſo great a lapſe of time ſince the paſſing of the act, without any caſe having put ſo extended a conſtruction on the words in queſtion, and coſts not having till now ever been ordered to be paid by the juſtices; it would be going too far at this time of day to ſay that they have the power of awarding coſts. With reſpect to the caſe of *The King* v. *Nelſon*, it is clear that the coſts there ſpoken of meant the coſts incurred in this court: the report in *Ventris* points to the coſts of ſuing out the certiorari. This Court has no original juriſdiction to make an order of filiation: they could only quaſh or confirm the order of the juſtices below. But if they confirmed the order, and thought that it had been vexatiouſly removed hither by certiorari, they might very well order the defendant to pay the coſts incurred in this court.

LE BLANC J. This is a new attempt to give the juſtices below a power of awarding coſts in this caſe, which they never exerciſed before, and in my opinion never had under the ſtatute of *Elizabeth*. The power conferred on the juſtices of giving relief to the burthened pariſh, in part or in all, muſt be confined to relief againſt the miſchief before recited, that of maintaining the child born in ſuch pariſh, and cannot be applied to the ſubſequent expence of procuring an order of filiation and maintenance. And this I think would be the proper conſtruction of the words, even if they were found in a recent act of parliament, which was now to have a conſtruction

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put upon it for the first time. But such it appears has always been considered to be the true construction of the act: and a strong argument is to be drawn from the case of *The King* v. *Moravia*, where the very ground on which the Court confirmed the order for the payment of a gross sum, "for the maintenance of the child and other *incident* charges and expences," was because they considered those other incident charges and expences as confined to charges and expences attending the maintenance of the child: considering that, unless so confined, the order would have been bad. So much, therefore, of the order as directs the payment of costs must be quashed; but it must be confirmed for the rest, the order itself having separated the sums to be paid.

Order quashed as to the payment of the costs.

TIMSON and Others *againſt* MERAC and Another.

Friday, Nov. 13th.

The ſtat. 43 G. 3. c. 153. ſ. [illegible] having enabled the king by order in council to licenſe the importation of certain goods, being *Britiſh* or neutral property, from the enemy's country, in neutral ſhips, a contract made by *A.* and *B.*, *Britiſh* ſubjects, (the plaintiffs) for the purchaſe of brandy from a houſe of trade in *France* (an enemy,) to be ſhipped from thence in a neutral, on account of *A.* and *B.*; which contract was made *in contemplation of obtaining a licence* for that purpoſe; which licence was accordingly obtained ſoon after the making of ſuch contract and before it was begun to be executed; is a legal contract, and may lawfully be guarantied in the firſt inſtance by *C.* and *D.* other *Britiſh* ſubjects (the defendants). And after ſuch licence obtained the guarantees are liable in damages for the non-ſhipment of the goods by the houſe in *France* on board a neutral ſent there for that purpoſe.

Though it were objected to the licence legalizing ſuch trade, that it was not made out to *A.* and *B. by name*, but only to *C.* and *D. and other Britiſh merchants*; and that neither *C.* and *D.* nor even *A.* and *B.* had any property in the goods; whereas the licence required the goods to be imported to be *the property of the ſaid perſons or ſome of them*; and until ſhipment the property continued in the houſe in *France*.

For neither the act of parliament nor the king's licence required the owners of the property to be *individually named*; and even if the licence were to be ſo conſtrued, as it only required the goods imported to be the property of "the ſaid perſons or ſome of them, *as* "*may be ſpecified in their bills of lading*;" and as no bills of lading were made out, which might have been made in the names of *C.* and *D.*, and if ſo, would have conveyed to them a legal or ſpecial property in the goods; the defendants *C* and *D.* were ſtill liable to anſwer in damages, upon their guarantie, as for the non-performance of a legal contract.

THE firſt ſpecial count of the declaration ſtated, that on the 1ſt of *September* 1806, at *London*, &c. a diſcourſe took place between the plaintiffs and defendants, concerning the purchaſe, ſale, and ſhipment of 250 puncheons of brandy for the plaintiffs by Meſſrs. *Gordon* and Company, then being in parts beyond the ſeas; but the plaintiffs not being ſatisfied with the reſponſibility of *Gordon* and Co., it was agreed between the plaintiffs and defendants, that the latter ſhould guarantie to the former the ſhipment of the brandy on their account: and thereupon, in conſideration of the premiſes, and that the plaintiffs at the defendants' requeſt would agree that *Gordon* and Co. ſhould purchaſe for them, the plaintiffs, and that they would buy from *Gordon* and Co. the brandy, on the terms and conditions after mentioned, the defendants promiſed that *Gordon* and Co. ſhould purchaſe for them 250 puncheons of *Cogniac* brandy, by bills of exchange to be drawn for the ſame on ſhipment of ſuch brandies, and forwarding in due courſe the bill of lading and invoices thereof; the ſaid brandies to be purchaſed forthwith, and a veſſel chartered in the defendants' names at a

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freight agreed upon by the plaintiffs, viz. for the purpose of bringing the brandies from parts beyond the seas to this kingdom. And the plaintiffs averred that they accepted the said agreement, &c. on the terms and conditions aforesaid: and that on the 6th of *September* 1806, at *London*, &c. a vessel was chartered by the defendants for the purpose of bringing home the said brandies: which vessel on the 10th of *September* sailed from *London* to parts beyond the seas for that purpose, and on the 17th of *September* arrived at parts beyond the seas where *Gordon* and Co. were to ship the brandies, and that the master gave notice thereof to *Gordon* and Co., and requested them to ship the brandies; and that the plaintiffs were always willing to accept and pay for the same: yet that the defendants did not perform their promise; nor did they, or *Gordon* and Co., though requested, purchase for the plaintiffs such brandy, and ship the same; but refused and neglected so to do: wherefore the vessel was obliged to return to this kingdom without the brandy: and such brandy having since greatly increased in value, the plaintiffs have thereby lost divers gains which otherwise would have accrued to them from the performance of the defendants' promise. There was another special count on a similar agreement and guarantie for the purchase and shipment abroad, by *Gordon* and Co., of 50 puncheons more, in addition to the 250 puncheons, of *Cogniac* brandy to be sent to the plaintiffs in this kingdom: and there were also the common money counts. The defendants pleaded the general issue; and at the trial at *Guildhall* a verdict was found for the plaintiffs, with 6000*l.* damages, subject to the opinion of the Court on the following case.

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Previoufly to making the contract ftated in the firft count it was in the contemplation of the parties that *Gordon* and Co., then being *French* merchants refiding at *Pons* in the *French* dominions, fhould purchafe for and fell to the plaintiffs 250 puncheons of brandy, to be fhipped by *Gordon* and Co. for the plaintiffs, merchants in this country; but the terms on which the brandies were to be purchafed were firft ftated in a letter received from the defendants in the following words: " Meffrs. *Timfon, Wright* and Co. *London, Sept.* 1ft, 1806. Gent. We engage that Meffrs. *Gordon* and Co. of *Pons* fhall purchafe for you 250 puncheons of good and genuine *Cogniac* brandy not exceeding 105 francs p. 27 velts, firft coft, to be drawn for the fame direct at three ufances on fhipment, and forwarding in due courfe the bill of lading and invoices; the brandies to be purchafed forthwith, and a veffel chartered in our name at a freight agreed upon by you." (Signed) *T. Merac* and Co. On the receipt of this letter, the plaintiffs, having agreed to the terms, after having copied them verbatim, wrote underneath fuch terms the following anfwer, which they fent to the defendants. " Meffrs. *T. Merac* and Co. 1ft *Sept.* 1806. Above we hand you a copy of your engagement with us for the purchafe of 250 puncheons beft good genuine *Cogniac* brandy for our account, guarantied by you, and which is hereby confirmed by this our written acceptance for the fame." (Signed) *Timfon* and Co. A fhort time afterwards the defendants offered to enter into fimilar engagements with the plaintiffs for *Gordon* and Co.'s fhipping 50 other puncheons of brandy; which offer the plaintiffs accepted by another letter of the 6th of *Sept.* 1806, " under the terms and conditions of your (the defendants') former guarantie;" which letter alfo directed

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certain marks to be put on the puncheons: and this was acknowledged and acceded to by the defendants in another letter to the plaintiffs of the 8th of *Sept.* 1806. Under these contracts a vessel was chartered at such freight and for such purpose as are stated in the first count; which vessel proceeded to *Charente* in *France*, where the brandies were to be shipped; and there the master applied to *Gordon* and Co. for the shipment of them according to the contracts; the plaintiffs having always insisted on their performance; but no brandies were shipped, as agreed upon, and the vessel returned home without them. The price of such brandy afterwards rose, and the plaintiffs lost the benefit of the rise of the market. The contracts were made in time of war between this country and *France*; but by the stat. 43 *Geo.* 3. *c.* 153. *s.* 15., reciting that since the commencement of the present hostilities an order of council had been made for granting licences, which had accordingly been granted, to permit the importation of certain goods, being *British* or neutral property, contrary to the laws then in force; which importations were necessary during hostilities, and ought to be justified by law: and that it was expedient that his majesty by order of council should be authorized to permit during the continuance of hostilities, &c. the importation in neutral ships of any goods from any port or place of the enemy: it is enacted, that every importation of goods made by virtue of any such order and licence, &c. should be deemed to be good in law, notwithstanding any other act of parliament to the contrary. And by *s.* 16. his majesty is empowered by order in council from time to time to permit during the continuance of hostilities, &c. any such goods as should be specified in any such order in council to be imported from any port or place of

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the enemy, in neutral ships. Under this act the king by order in council of the 14th of *September* 1803 licensed the importation of brandy, (amongst other things,) being neutral property, or the property of *British* subjects duly licensed, from any port or place of the enemy in any neutral ship; in which order there was a proviso that nothing therein contained should extend to authorize any *British* subject to trade from any port or place belonging to an enemy without licence for that purpose duly obtained. On the 16th of *September* 1806 the following licence was duly obtained for the importation of a cargo as therein mentioned, by the *American* ship *Sarah*, a neutral. "*George* Rex, &c. To all commanders of our ships of war, &c. Our will and pleasure is, that you permit *Theo. Merac* and Co. *and other British merchants*, on board the *American* ship *Sarah*, *J. S.* master, to import one cargo without molestation from any port of *France*, &c. to any port of the United Kingdom, either directly or circuitously, salted provisions of all sorts, seeds, saffron, &c. (enumerating various articles,) *and brandy; being the property of the said persons, or some of them, as may be specified in their bills of lading;* provided the same shall be shipped as aforesaid. This licence to remain in force for six months from the date, &c. Provided also, that any person who shall claim the benefit of the licence hereby granted shall take and have the same upon condition, that if any question arises in any of our Courts of Admiralty or elsewhere, whether such person or persons hath or have in all points conformed thereto, in all cases whatever the proof shall lie on the person or persons using this our licence, or claiming the benefit thereof. Given at our Court, &c. the 16th of *Sept.* 1806, &c. (Directed) *Theo. Merac* and Co. et al. Licence to import."

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import." *Charente* is a port of *France* to which the licence extended. If the plaintiffs were entitled to recover; the verdict was to stand: if not, a nonsuit was to be entered.

Lawes, for the defendants, contended that this was only a licence to *Merac* and Co. to trade; and they having no property in the goods, but only having guarantied the performance of the contract by *Gordon* and Co. abroad, the owners were not properly described, as required in the licence; which was therefore void, and the trading illegal; and if so, the contract of guarantie could not be enforced (*a*). The stat. 43 *Geo.* 3. *c.* 153. *f.* 15. enabling the king in council to grant licences to trade with the enemy in certain cases, recites the expediency of such licences to permit the importation of certain goods being *British or neutral property* from the enemy's ports; and the licence granted is confined to the importation of such property; and the onus probandi laid on the party claiming the benefit of the licence. It ought therefore to appear on the face of the licence itself to whom the property belongs; though it may not be necessary under the terms, "*and other British merchants*," to name every individual who is entitled to a share of the adventure. But here the only persons named are *T. Merac* and Co., who have no property whatever in it. But admitting that the plaintiffs might claim any property of theirs obtained through the licence, under the general description of *Bri-*

(*a*) The purchasing goods in an enemy's country to be sent here is illegal without the king's licence. *Potts* v. *Bell*, 8 *Term Rep.* 548. and *Vandyck* v. *Whitmore*, 2 *East*, 475. But it was admitted that if the trading were legalized by the licence, the contract of guarantie of such trading was incidentally legalized also; according to *Kensington* v. *Inglis*, 8 *East*, 273.

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tish merchants, it does not appear that even they had any property in the brandy at the time of the licence obtained or down to the present moment. Until the brandy was actually purchased the property remained in the enemy's subjects, and nothing has happened to transfer it from them to any *British* or neutral subject: it was not therefore the proper subject of a licence, merely because the plaintiffs or any other persons answering that description might eventually acquire a property in it.

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Holroyd observed shortly, that the act of parliament looked only to the property of the goods to be licensed at the time of their importation, and legalized the trading prospectively, without which it could not be carried on at all. The licence was to permit *T. Merac* and Co. *and other* British *merchants* (which included all others of that description) to *import* one cargo of the goods specified, being the property of some of the said persons, *as may be specified in their bills of lading*, &c. Now here there were no bills of lading; and therefore it could not be told that the bills would not specify the persons who had the property in the goods; nor can it be presumed that every thing required by the act of parliament and the king's licence would not have been performed: but it is enough in this case that the contract of guarantie made by the defendants was lawful, being made in contemplation of a lawful licence

Lord ELLENBOROUGH C. J. It is not necessary to argue the case further. The trading in this case, in contemplation of which the contract of guarantie was made, was not absolutely and at all events illegal, but legal sub modo, that is, provided the parties obtained a licence from

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from the crown, under the order of council to import the goods; which licence, when obtained, would legalize the contract in *France* for the purchase of such goods. The end being legitimate, the means necessary to its completion must be so too. In contemplation of the licence, *Merac* and Co., who appear to have been the correspondents of *Gordon* and Co. then residing in *France*, contracted with the plaintiffs for the supply of a quantity of brandy by *Gordon* and Co. on certain terms, and *Merac* and Co. guarantied to the plaintiffs the shipment of it by *Gordon* and Co. from *France*, on account of the plaintiffs, on the terms agreed upon. A licence was then obtained for "*Merac* and Co. *and other* British *merchants*," to import in an *American* ship the brandy; being, as it is stated, *the property of the said persons* or *some of them, as may be specified in their bills of lading*. And the question now is, whether the licence be void, because it does not specify the names of the plaintiffs, whose property this would have been upon the shipment and importation into this kingdom. If the licence had only extended to cover the property of *Merac* and Co. and they had had no other interest in the goods than appears upon the statement of this case, it might have been contended not to be sufficient to cover this adventure; but it includes *other* British *merchants;* and it afterwards says, "being the property of the said persons *or some of them.*" It might indeed have been a more certain means of avoiding fraud if the names of the persons really interested were specified in the licence; but the act of parliament does not require this; and it appeared at the trial that the licence in question was in the common form. The articles, however, licensed to be imported are specified, together with the ship, and the time; and there could be

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no more than that ſhip could contain in one cargo; and theſe checks ſeem to have been thought ſufficient for the purpoſe in view, without greater particularity. There being then no vice in the original contract, there is no reaſon why the plaintiffs ſhould not recover againſt theſe defendants upon the contract of guarantie which they entered into for the due performance of the original contract, which the perſons abroad have failed to perform.

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GROSE J. declared himſelf of the ſame opinion.

LAWRENCE J. The circumſtances of the caſe ſhew that the contract was entered into by theſe parties in contemplation of acquiring a licence to make the trading legal; which was accordingly obtained: and the contract being lawful, the defendants are neceſſarily liable on their guarantie for the non-performance of it.

LE BLANC J. The queſtion turns on the legality of the contract, which muſt have been made before the licence was obtained. There exiſted, however, before the contract was made an act of parliament enabling the king in council to make orders and to grant licences for trading with the enemy. Then the contract in queſtion was made in contemplation of ſuch a licence, which was in fact afterwards obtained. The licence is to *Merac* and Co. *and other* Britiſh *merchants* to import the brandy, "being the property of the ſaid perſons, or ſome of them, *as may be ſpecified in their bills of lading.*" Now ſuppoſing it were neceſſary to have named in the licence the particular perſons to whom the property was conſigned, it does not appear but that *Merac* and Co. might have had the bills of lading made out to them if the contract had been executed, which would have given them the legal property

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property in the goods. So that the legality of the contract, the performance of which the defendants have guarantied, ftands clear of all objection.

Poftea to the Plaintiffs.

Saturday, Nov. 21ft.

Ex parte JOHN CARUTHERS.

The ftat. 13 *G.* 2. *c.* 28. *f.* 5. exempting from the imprefs fervice any harpooner, &c. or *feaman* in the *Greenland* fifhery trade, is impliedly repealed by the ftat. 26 *G.* 3. *c.* 41. *f.* 17. which exempts fuch harpooner, &c *whofe name fhall be inferted in a lift*, required to be delivered on oath by the owner of the veffel to the collector of the cuftoms; and which alfo exempts any *feaman* entered on board any fhip intended to proceed on the faid fifhery in the following feafon, *whofe name fhall be inferted in a lift to be delivered as aforefaid*, and who fhall have given *fecurity*, &c. to proceed, and fhall proceed accordingly: for the latter ftatute superadds the infertion of the feaman's name in fuch lift as a condition precedent to the exemption.

THIS was the cafe of an impreffed feaman on board his majefty's fhip *Texel*, for whofe liberation a writ of *habeas corpus* had been fued out before a Judge at Chambers, grounded upon an affidavit, ftating, that by an agreement in writing, under feal, dated the 11th of *March* 1807, between the mafter and part owner of the fhip *Experiment*, then bound on a voyage to the *Greenland* feas, &c. and the officers and feamen of the faid fhip, the latter agreed to go on the faid voyage in that fhip. That *Caruthers* executed the agreement as a carpenter and feaman, and entered on and performed the voyage, and on the 30th of *July* laft was impreffed from on board the *Experiment*, at fea, on her return home (*a*) from *Greenland*, and carried on board the *Texel*. That he did not enter into the king's fervice, nor receive the bounty. And it concluded by claiming for him an exemption from being impreffed until the voyage was completed. A rule nifi was obtained in this term for quafhing the writ quia improvide emanavit, when it appeared to have been granted upon the ftat. 13 *Geo.* 2. *c.* 28. *f.* 5. relating to the *Greenland* trade; which enacts, " that no

(*a*) This was afterwards admitted to be while the fhip was on her voyage home.

" harpooner,

" harpooner, line manager, boat fteerer, or feaman, who " fhall be in or belonging to any veffel in the *Greenland* " fifhery trade, fhall be impreffed from the faid fervice; " and that any fuch harpooner, &c. or feaman may, " during the time of the year that he or they are not " employed in the faid fifhery, fail in the colliery trade, " upon giving fecurity to the fatisfaction of the com- " miffioners of the cuftoms that he or they will proceed " in the faid veffel to *Greenland*, &c. on the whale fifhery " the next feafon." Then the ftat. 26 *Geo.* 3. *c.* 41. *f.* 17. enacts, " that no harpooner, line manager, or boat " fteerer, who fhall be in or belong to any veffel in the " *Greenland* fifhery trade, and *whofe name* (diftinguifhing " the capacity in which he is to act) *fhall be inferted in a* " *lift*, (which is hereby required to be delivered on oath " by the owner of fuch veffel to the collector of the " cuftoms, &c.) fhall be impreffed from the faid fervice: " and that any fuch harpooner, &c. may, during the " time of the year that he is not employed in the faid " fifhery, fail in the colliery trade; upon giving fecurity " to the fatisfaction of the commiffioners of the cuftoms " that he will proceed in the faid veffel to the *Greenland* " feas, &c. the next feafon: and that every *feaman* or " *common mariner* who after the firft of *February* in any " year fhall be entered to ferve on board any fhip which " fhall be intended to proceed on the faid fifhery in the " following feafon, *whofe name fhall be inferted in a lift* " *to be delivered as aforefaid, and who* fhall have given *fe-* " *curity* to the fatisfaction of the commiffioners of the " cuftoms to proceed, *and* fhall proceed accordingly, *fhall* " *be privileged aud exempt from being impreffed* from or " out of the faid fervice from the faid 1ft of *February* " until after the expiration of the then next feafon for " the

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"the faid fifhery, and until the voyage home from thence "fhall be fully complete and ended, *and no longer*; any "law, &c. to the contrary notwithftanding." Then the ftat. 26 *Geo.* 3. *c.* 50. repeals part of the ft. 15 *Geo.* 3. *c.* 31. and the ftat. 16 *Geo.* 3. *c.* 47. and every act and part of an act repealed by either of them (not including the ftat. 13 *Geo.* 2. *c.* 28.) and regulates the *Greenland* trade; and provides by *f.* 25. "that no harpooner, line manager, or "boat fteerer," (omitting *feamen*) "belonging to any "veffel fitted out on the aforefaid fifhery, fhall be im- "preffed from the faid fervice, but fhall be and is here- "by privileged and exempt from being impreffed, fo "long as he fhall belong to and be employed on board "any veffel whatever in the fifhery aforefaid." The ftat. 28 *Geo.* 3. *c.* 20. makes fome further regulations as to the trade. And, laftly, the ftat. 35 *Geo.* 3. *c.* 92. repeals the ftat. 26 *Geo.* 3. *c.* 50. and 28 *Geo.* 3. *c.* 20. and every act and part of an act repealed by either them; and after regulating the trade, re-enacts the 25th fect. of the ftat. 26 *Geo.* 3. *c.* 50. in totidem verbis (*a*).

Marryat, in fhewing caufe againft the rule, contended that the ftat. 13 *Geo.* 2. *c.* 28. *f.* 5., extending the protection to feamen generally, in the *Greenland* trade, remained unrepealed; not being inconfiftent with the provifion in the 17th fect. of the ftat. 26 *Geo.* 3. *c.* 41. which went to exempt the feaman whofe name was inferted in the lift there defcribed from being impreffed, as well *before*, as during the continuance of the fervice: and here the man was preffed during the actual fervice. But if

(*a*) Vide alfo the ftat. 42 *G.* 3. *c.* 22. *f.* 2. protecting a certain number of harpooners, line managers, and fteerfmen, in proportion to the tonnage, from being impreffed.

such

ſuch inſertion of his name in the liſt, as required by the latter ſtatute, were a condition precedent to his right of exemption; (an opinion which the Court had before intimated;) then he argued that the act being to be done by another perſon, and not by the party himſelf, the omiſſion of it ought not to prejudice the latter.

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The Attorney-General and *Jervis* were to have ſupported the rule; and ſtated further that the party had not given any ſecurity, as required by the act. But

The Court were clearly of opinion that the inſertion of the ſeaman's name in the liſt was by the expreſs terms of the clauſe made a condition precedent to the exemption; and that the act of the 26 *Geo.* 3. *c.* 41. *ſ.* 17. repealed by implication (*a*) the general proviſion of the ſtat. 13 *Geo.* 2. *c.* 28. *ſ.* 5. by requiring ſomething more to be done than the mere act of entering on board a *Greenland* veſſel, in order to protect the ſeaman from being impreſſed: and therefore they made the rule abſolute for quaſhing the writ of habeas corpus; and remanded the party to his former ſtation on board the king's ſhip. And Lord *Ellenborough* C. J. intimated that if he had been deprived of his privilege by the default of any other perſon, he might have his remedy of another ſort againſt him.

Rule abſolute.

(*a*) The rule, as laid down by *Eyres* J. in *Harcourt* v. *Fox*, 1 *Show.* 520. is, "that ſtatutes introductive of a new law, penned in the affirmative, do always repeal former ſtatutes concerning the ſame matter, as implying a negative."

1807.

Saturday, Nov. 21st.

KNIGHT *against* CRIDDLE.

The Court will not order the sheriff to retain, in satisfaction of a present writ of fi. fa. issued by the plaintiff against the defendant, *money* or *bank notes*, which the sheriff had before received for the use of the defendant, in discharge of an execution levied by the defendant against another, and which the sheriff had not paid over.

THE present defendant had recovered judgment and sued out execution against one *S. H.* for his debt and costs; and in discharge of that execution *S. H.* paid into the hands of the sheriff of *Hants* 60*l.* in bank notes: and before that money was paid over, the present plaintiff recovered judgment and sued out his writ of fieri facias for 33*l.* 10*s.* debt and costs against the defendant, which was delivered to the same sheriff. And now, upon an affidavit of these facts by the sheriff's officer, and that he had in pursuance of the sheriff's warrant levied the debt and costs in this cause out of the 60*l.* in bank notes remaining in the sheriff's hands, and that he could not find any other goods and chattels of the defendant whereof to levy the said debt and costs;

Gaselee moved for a rule to shew cause why the sheriff of *Hants* should not pay over to the plaintiff the amount of his debt and costs in this cause out of the sum received by him on account of the defendant, as before mentioned; and in the mean time retain the said sum in his hands. And he cited *Armistead* v. *Philpot* (*a*), where a similar rule was made absolute, without opposition, except so far as to secure the attorney's lien for his bill. But by

Lord ELLENBOROUGH C. J. We ought not to force the defendant to come here to shew cause against a rule founded on the assumption, that money (and bank notes for this purpose are the same) may be taken in execution.

(*a*) *Dougl.* 230.

It

It is an innovation on the law, which ought not to be admitted. The case in *Douglas* was by consent. The other Judges concurred in refusing to grant a rule to shew cause (*a*).

(*a*) Upon the same principle that money cannot be taken in execution, this Court, in *Fieldhouse* v. *Croft*, 4 *East*, 510. refused to stay in the sheriff's hands even the surplus of a former execution against the defendant's goods at the suit of the same plaintiff, for the purpose of satisfying a new execution.

TAYLOR *against* LENDEY.

Tuesday, Nov. 24th.

One who had voluntarily offered to pay a sum of money for the use of the poor of the parish, in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor; which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the workhouse for the use of the poor; may at any rate countermand the application of the money before it is so applied; and may recover it back in an action for money had and received.

IN assumpsit for money had and received, &c. a verdict was taken for the plaintiff at the last assizes at *Exeter*, for 5*l.* 5*s.*, subject to the opinion of the Court on this case. Mr. *Tucker*, a justice of the peace for the county of *Devon*, had directed a constable and his assistant to take a man, who had been charged before him with an unnatural crime, to a public house, and there keep him in custody while his commitment was making out. The plaintiff an innkeeper, and one *Hill*, who were waiting to see the magistrate on business, were in the same room. The magistrate came to the door of the public house with the commitment, and both the constable and his assistant went out to him; and while they were out, the prisoner, who was left in the room with *Hill* and the plaintiff, (who knew he was in custody,) made his escape; but was shortly after retaken, and represented to the magistrate that the plaintiff had encouraged him to run away; which the plaintiff and *Hill* denied. The plaintiff and *Hill* were summoned before the magistrate the next morning, when the prisoner was examined, and swore to his

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Taylor *against* Lindsey.

former assertion, which was denied by the plaintiff and *Hill*. The magistrate said that some notice must be taken of this; and the plaintiff said he was ready to answer any charge which was brought against him. The plaintiff being much agitated in consequence of this charge against him, became dangerously ill, and was confined to his bed; when his brother, after consulting with the plaintiff's wife, applied to the magistrate, stated the plaintiff's situation, desired him to relieve his brother's mind, and said that he would pay any sum the magistrate should think proper to get rid of the charge. The magistrate in consequence of this representation said, that he thought reparation would be made to the public if the plaintiff paid five guineas to the defendant, who is governor of the poor house at *Axminster*, for the use of the poor of *Axminster*: and that if that were done, he would not go on with any prosecution against the plaintiff. This was acceded to, and the money paid to the defendant by the plaintiff's brother, on his behalf; and nothing more has been done in the prosecution against the plaintiff. The plaintiff, when he recovered, was dissatisfied with what had been done, and applied to the defendant to have his money back again, which was then remaining with the defendant; but this was refused; and this action was thereupon brought. If the plaintiff were entitled to recover, the verdict was to stand; if not, a nonsuit was to be entered.

Lens Serjt. for the plaintiff, contended, that the defendant being in the nature of a stakeholder, having received the plaintiff's money without consideration, and having had notice to return it before it was paid over to the poor, for whose use it was so received, was liable to the plaintiff in this action. The money was paid to the defendant

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ant without consideration, or upon one that was illegal; for it was paid on the supposition that the plaintiff had been guilty of a public misdemeanor, and in order to redeem him from prosecution. If it had been paid by the plaintiff voluntarily, there might have been a difficulty in his recovering it back; though still the situation of the defendant as a stakeholder would have made his authority revocable while it was executory; but the case shews that the money was paid under a threat of prosecution, and in order to avoid it. If the plaintiff were really guilty of the offence with which he was charged, the prosecution ought not to have been stopped on account of his paying a sum of money for a purpose wholly collateral to the transaction: if innocent, as he insisted that he was, then the money was illegally extorted from him under a threat of a prosecution, to redeem himself from the expence and vexation of which it was paid; and was therefore paid under duress. His guilt or innocence was not put in question. If the act in respect of which the payment was made were in itself illegal, and the parties in pari delicto, the money could not have been recovered back again: but here the parties were not in pari delicto, but it was paid by the plaintiff to relieve himself from the vexation and expence of a prosecution, and may therefore be recovered back. As in *Williams* v. *Hedley* (a), money paid by the plaintiff to the defendant, in order to compromise a qui tam action for usury, was held to be recoverable back; considering that the prohibition and penalties of the stat. 18 *Eliz. c.* 5. only attached upon the compounding informer, and not upon the party paying the composition, who was therefore not in pari

(a) 8 *East*, 378.

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delicto. And the Court would not in that shape enter into the consideration whether the plaintiff had been guilty of the usury with which he was charged. But even if this payment had been made upon an illegal consideration; yet the defendant standing in the situation of a middleman or stakeholder, it was competent for the plaintiff to revoke his authority before the money was actually paid over and applied to the use of the poor: as in *Cotton* v. *Thurland* (*a*), where money deposited with a stakeholder, upon a wager on the event of a battle to be fought by the parties to the wager, was recovered back even after the battle was fought; notice having been given by the plaintiff to the stakeholder, before it was paid over, not to pay it.

Lord ELLENBOROUGH C. J. then called upon the counsel for the defendant to distinguish this, if he could, from the case of the stakeholder, having received notice to pay back money deposited before it had been applied: and intimated that the defendant was to be considered as an agent for the party paying the money to be applied to the use of the poor; and being an agent, his authority was revocable, and was actually revoked before the money was paid over.

Disney, for the defendant, denied that the money had been paid by the plaintiff under duress; he was not in custody at the time; nor was he threatened with the prosecution if he did not pay it: but the payment was proposed to be made voluntarily on his behalf, upon an implied admission of the offence imputed to him, and as a satisfaction to the public for it. And he contended

(*a*) 5 *Term Rep.* 405.

that

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that the defendant was entitled to retain the money ſo paid, either on the ground that the tranſaction was legal, and that it was competent to the magiſtrate to agree to forego the proſecution upon the ſubmiſſion and confeſſion of the plaintiff, and his paying the five guineas for the uſe of the poor, as a public ſatisfaction for the offence; in which caſe the plaintiff had a ſufficient conſideration for the payment: or on the ground that if the tranſaction were illegal, the plaintiff was in pari delicto, and therefore could not recover back the money ſo paid: or that ſuppoſing both parties to have miſtaken the law, in this reſpect, yet that money paid under ſuch miſtake cannot be recovered back. This, he ſaid, was diſtinguiſhable from *Collins* v. *Blantern* (*a*); for there the proſecution, which was for perjury, had proceeded to trial, and the agreement was corruptly made for the benefit of the proſecutor, who on that account forbore to appear and proſecute: but here no benefit was reſerved to any individual, but only to the public; and there was no corrupt ſtipulation to ſtifle juſtice, but all the parties acted bonâ fide.

Lord ELLENBOROUGH C. J. This argument might have applied to a caſe where the defendant had paid the money over to the uſe of the poor for whom it was received, before notice; but how can you make it bear upon this caſe, where, whether the purpoſe were legal or illegal, the money ſtill remained in the hands of an agent, acting under a countermandable authority, whoſe authority was actually countermanded by his principal before the money was applied? Take it, that the money

(*a*) 2 *Wilſ.* 341. 347.

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had been paid by the plaintiff to the defendant for a charitable purpofe, but before the defendant had made any application of it, the plaintiff countermanded the payment: was there not then an end of the authority; and could the agent perfift in applying it againft the direction of his principal? The queftion therefore is reduced to the cafe of a countermanded agent. If the mafter of the workhoufe had applied it before any countermand, it would have been too late for the countermand to have operated, and the cafe muft have refted upon the general argument; but there is no pretence for faying that the payment to him for the ufe of the poor was for this purpofe a payment to the poor. The cafe of *Cotton* v. *Thurland* is oppofed to that argument.

Difney then faid that he had no authorities to meet the argument againft him on this point.

Lord ELLENBOROUGH C. J. The principal queftion meant to be agitated does not arife in this cafe. We may affume, for the purpofe of the argument, that it would have been a legal payment, and could not have been recovered back again if the money had been paid over before the countermand; and ftill the plaintiff would be entitled to recover the money back, on the ground of the countermand.

The other Judges affenting,

Poftea to the Plaintiff.

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JONES, Aſſignee of the Sheriff of CUMBERLAND, *againſt* STORDY.

Tueſday, Nov. 24th.

The Same *againſt* BLAIN.

Where the writ was to appear before the king *whereſoever he ſhould then be in* England, and the ſheriff took a bail bond for the party's appearance before the king *at Weſtminſter* on the day named in the writ; held to be a ſubſtantial compliance with the ſtat. 23 *H.* 6. *c.* 9. ſo as to entitle the aſſignee of the ſheriff to recover on ſuch bond.

THESE were actions of debt by the aſſignee of the ſheriff on bail bonds, wherein the plaintiff declared that on the 2d of *April* 47 *Geo.* 3. he ſued out of the Court of *K. B.* againſt one *W. Moore* a ſpecial teſtatum capias writ directed to the ſheriff of *Cumberland*, by which writ the king commanded the ſaid ſheriff to take the ſaid *W. M.* &c. "ſo that he might have his body before our "ſaid lord the king in 15 days of *Eaſter*, *whereſoever* "*our ſaid lord the king ſhould then be in* England, to "anſwer" the plaintiff in a plea of treſpaſs on the caſe on promiſes, &c.; which writ was indorſed for bail for 173*l.* and before the return thereof was delivered to the ſheriff to be executed; by virtue of which the ſheriff arreſted *Moore*, &c.; and took bail for his appearance, according to the form of the ſtatute, at the return of the writ. And that the defendant *Stordy*, on the 11th of *April* 1807, executed the bail bond to the ſheriff, (the date whereof is by miſtake the 11th of *March* 1807), conditioned "that if the ſaid *W. Moore* ſhould appear "before our ſaid lord the king *at Weſtminſter* in 15 days "of *Eaſter* then next following to anſwer" to the ſaid plaintiff, &c. then the obligation to be void. The plaintiff then averred that *Moore* did not appear before our ſaid lord the king *at Weſtminſter* in 15 days of *Eaſter* in the condition mentioned according to the exigency of the ſaid writ, whereby the bail bond became forfeited,

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And that the money not being paid, the sheriff assigned the bond to the plaintiff according to the form of the statute, &c. by reason whereof, &c.

To this the defendant demurred, and shewed for special causes, that it appears by the declaration that the writ of special testatum capias commanded the sheriff to take *W. Moore*, &c. so that he might have his body before the king at a certain day therein mentioned *wheresoever our said lord the king should then be in* England, by virtue of which writ *Moore* was arrested; and that the bail bond taken by the sheriff on that arrest was conditioned for the appearance of *Moore* "before our said lord the king *at Westminster*," and is therefore void. And also for that the said writ is a process by original, and the bail bond is taken on a process by bill, and is therefore void and null by the statute, &c. Joinder in demurrer. There were the like pleadings in the cause against the other bail.

Walker, in support of the demurrer, relied upon the variance between the writ and the condition of the bond, the latter of which does not follow the writ, as required by the st. 23 *H.* 6. *c.* 9., prohibiting sheriffs from taking any bail bonds "but by the name of their office, and upon "condition written, that the prisoners shall appear at the "day contained in the said writ, and in such *places* as "the said writs, &c. shall require." Then as the stat. 28 *Ed.* 1. *c.* 5. directs the justices of his Bench to follow the king wherever he may be; and all original processes returnable into this court are made returnable coram nobis ubicunque fuerimus in *Angliâ* (*a*), it might happen, if the place of the sitting of this Court were

(*a*) Co. Lit. 71. b.

removed

removed from *Westminster*, that a performance of the condition of the bond would not answer the exigency of the writ: and if the bond were void for this reason at the time it was given, the continuance of this Court at *Westminster*, at the return of the writ, will not make the bond good: and consequently it is immaterial to the validity of it in law, that in fact the party did comply with the condition, and did put in special bail. In *Burton* v. *Lowe* (*a*) the condition of the bond was to appear on such a day in Cancellaria apud *Westmonasterium* ubicunque fuerit; and on demurrer it was holden ill for the variance. And *Rolle* C. J. said that "neither the Upper Bench nor the Chancery are fixed courts; and therefore the defendant ought not to be bound precisely to appear at *Westminster*; and then to add ubicunque fuerit is a material variance, and makes the bond naught." In a subsequent case indeed, of *Lawson* v. *Haddock* (*b*), similar to the present, where the former case was cited, it was said that of later times the Courts had not been so strict upon the wording of bail bonds: but the Court came to no decision upon it, and ordered it to be further spoken to at the bar. And since then, in *Samuel* v. *Evans* (*c*), where the writ was returnable on *Monday next after* the morrow of *All Souls*, (the 6th of *November*), and the sheriff on the 4th of *November* arrested the defendant and took a bail bond conditioned for his appearance on *the morrow* of *All Souls* (3d of *November*); after verdict in an action by the sheriff's assignee the judgment was arrested, because it was impossible that any appearance according to the condition of the bond could have answered the purposes of the writ,

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(*a*) *Sty.* 234. (*b*) 2 *Ventr.* 237. (*c*) 2 *Term Rep.* 569.

Lawes,

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Lawes, contrà, was ftopped by the Court.

Lord ELLENBOROUGH C. J. If any inconvenience could have enfued to the party from his being deceived by the fheriff's taking the bond with a condition in this form, we might have corrected it on motion. But this is a bond taken in all its effential parts according to the ftatute. There is a day named in the writ, but no certain place: and the condition of the bond is rightly taken to appear on the day named: and inftead of requiring the party's appearance wherever the king fhall then be in *England*, *Weftminfter* is mentioned in terms, which, according to the common underftanding of every body at this day, (confidering that this Court has been invariably held here for many centuries, except only when it was removed for a fhort period to *Oxford* in 1665 (*a*).) is the place meant by the more general defcription in the writ. The variance in this cafe is certainly not greater than in *Shuttleworth* v. *Pilkington* (*b*), where the writ was returnable coram domino rege ubicunque tunc fuerit in *Angliâ*, and the bail bond was conditioned to appear coram domino rege generally; which was held fufficient; for the Court faid they would underftand an appearance "before the king" to mean "before the king *in his court*," and not before him *in perfon*.

Per Curiam, Judgment for the Plaintiff (*c*).

(*a*) Vide 4 *Blac. Com.* 265. (*b*) 2 *Stra.* 1155.

(*c*) See all the cafes collected in Mr. Serjt. *Williams*'s Note to *Fofter* v. *Hanfon*, 2 *Saund.* 59. *a.* &c.

1807.

DOE, on the Demise of RICHARD OTLEY, *against* CATHARINE MANNING, Widow, and S. GOOM.

Wednesday, Nov. 25th.

A *voluntary* settlement of lands made *in consideration of natural love and affection* is void as against a subsequent purchaser for a *valuable consideration*; though with notice of the prior settlement before all the purchase money was paid or the deeds executed; and though the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction; for the law, which is in all cases the judge of fraud and covin arising out of facts and intents, infers fraud in this case, upon the construction of the stat. 27 *Eliz.* c. 4.

IN ejectment for certain messuages and premises at *St. Mary Magdalen, Bermondsey*, in *Surry*; a verdict was found for the defendants, subject to the opinion of the Court on the following case. *Thomas Clendon*, being seised in fee of the premises in question, by his will of the 6th of *March* 1750, duly executed and attested, demised the premises (amongst others) to his nephew *William Clendon* for life; remainder to trustees during *W. C.*'s life to preserve contingent remainders; remainder to the first and other sons of *W. C.* successively in tail male; remainder to the testator's nephew, *Owen Manning*, for life; remainder to trustees during *O. M.*'s life to support contingent remainders; remainder to the first and other sons of *O. M.* successively in tail male; remainder to his own right heirs for ever: and gave the usual powers of leasing, in possession, at rack rents, for 21 years; and also power to each of the devisees, when in actual possession, to settle upon such person as he should marry, for her jointure, premises of the yearly value of 80*l.* for every 1000*l.* he should receive with such wife. The testator died seised of the premises in 1751; and *Wm. Clendon*, his nephew, died in *March* 1764, without issue, whereby the estate descended to *O. Manning*, the next tenant for life, in remainder. By indenture of bargain and sale of the 25th of *Nov.* 1782, duly inrolled in C. B., between *Owen Manning* and *George Owen Manning*, his eldest son, of the 1st part, *T. Green* of the 2d part, and *P. Wilson* of the 3d part, *Owen Manning* and *George*, his son, sold and conveyed

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veyed the premises to *Green* in fee, to the intent that he might become tenant thereof, for the purpose of suffering a recovery, to the use of *O. Manning* and his assigns for life; remainder to the said *G. O. Manning* in fee: and a recovery was accordingly suffered in *Hil.* term 23 *Geo.* 3. On the 15th of *March* 1783 *G. O. Manning* died intestate and without issue; whereby the reversion in fee descended to *John Manning* his brother and heir at law. By indentures of lease and release of the 11th and 12th of *April* 1783, between *Owen Manning*, who was then in possession, of the first part, the said *John Manning* of the second part, and *W. Gill* and *H. S. Gill* of the third part; reciting the former indenture of bargain and sale, and the recovery, and the death of *G. O. Manning*, and that divers other messuages, &c. having in like manner descended to the said *John Manning*, he was desirous of making some settlement and provision for the benefit of his mother, in case she should survive *Owen Manning*, and of his sisters and younger brother; it was witnessed, that in consideration of the natural love and affection which *John Manning* bore towards *Catherine Manning* his mother, and *Jane*, *Catherine Matilda*, *Ann*, and *Matilda Manning*, his sisters, and *Charles Manning*, his brother, and for making provision for them for their respective lives, and of 10s. &c.; *Owen Manning* and *John Manning* conveyed to *W.* and *H. S. Gill* in fee, amongst others, all the said premises, habendum, &c. to the use of *Owen Manning* for life, sans waste; remainder to the use of the trustees, during the life of *O. M.*, in trust to preserve contingent remainders; remainder to the use of *Cath. Manning* for life, sans waste; remainder to the trustees and their heirs, upon trust, during the lives of *Jane*, *Catherine Matilda*, *Ann*, *Matilda*, and *Charles Manning*, and the survivor of them,

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them, to receive the rents, &c., and pay the same equally amongst his said sisters and brother, and to the survivor of them; remainder to *John Manning* in fee: with the like power of leasing as is contained in *Clendon*'s will; and a power for *Owen Manning*, during his life, and *Catherine* his mother, during her life, with the privity and consent of *John Manning* and the trustees, or the survivor, his heirs or assigns, testified as therein mentioned; and for *John Manning*, after his father's and mother's decease, with the like privity of the trustees, or the survivor, his heirs or assigns, testified as aforesaid; to execute like leases for 99 years. *Owen Manning* died the 9th of *Sept.* 1801. By indentures of lease and release of the 16th and 17th of *May* 1805, between *John Manning* of the first part, *R. Otley* of the second part, and *H. Otley* of the third part; reciting the indenture of bargain and sale of the 25th of *Nov.* 1782, and the deaths of *George Owen Manning* and *Owen Manning*, and that *John Manning* had contracted with *R. Otley* for the absolute sale of the premises; it was witnessed, that in consideration of 1800*l.* to *John Manning* paid, he conveyed to *R.* and *H. Otley* in fee all the said premises for which this ejectment was brought, being part of the premises in the last-mentioned deed; habendum to such uses as *R. Otley* should appoint; and in the mean time, and subject thereto, to the use of *R. Otley* in fee. The consideration for the conveyance to the lessor of the plaintiff was paid thus; by a book debt from *John Manning* to the lessor of plaintiff 417*l.* 2*s.* 9*d.* By cash at sundry times 1382*l.* 17*s.* 3*d.* The book debt was contracted, and 150*l.* of the consideration money paid, at the date of the purchase contract, and 387*l.* 5*s.* 6*d.* at a subsequent period, but before the execution of the conveyance of 1805, and before the lessor of

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the plaintiff had notice of the deed of 1783. The residue of the consideration was paid, and the deeds executed, subsequent to such notice. *John Manning* did not divest himself of all his property by the conveyance of the 12th of *April* 1783. There was no fraud in the last-mentioned conveyance, unless fraud is to be implied by construction or operation of law. The question for the opinion of the Court was, Whether the lessor of the plaintiff were entitled to recover against the defendant *Manning?* If the Court should be of opinion that he was, a new trial was to be had, or an issue granted, as the Court should direct, between the plaintiff and the defendant *Goom*, to try the validity of his lease. If the verdict on such new trial or issue should be found against *Goom*, a verdict was to be entered against both the defendants. But if the Court should be of opinion that the lessor of the plaintiff was not entitled to recover against the defendant *Manning*, the verdict taken for the defendants was to stand.

This case, which first came before the Court upon a motion for a new trial, being afterwards put into its present form by the desire of the Court, was elaborately argued in last *Easter* term by *Lawes* for the plaintiff, and *Best* Serjt. for the defendants; and again, in *Trinity* term last, by *Marryat* for the plaintiff, and *Shepherd* Serjt. contrà: and in the course of the arguments all the authorities bearing upon the question of the validity of voluntary conveyances upon *good* consideration, such as that of *blood*, or of *natural affection*, as contra-distinguished from conveyances for *valuable* consideration to purchasers, with or without notice of the prior conveyance, were cited and accurately discussed. But as the leading arguments

and authorities were all brought in review and weighed by the Court in the deliberate judgment pronounced upon the cafe in this term, it would be needlefs to repeat them. 1807.

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Lord ELLENBOROUGH C. J., after ftating the facts— On this cafe, as it is found that there was no fraud in fact in the conveyance of the 12th of *April* 1783, the only point for the confideration of the Court is, whether a voluntary conveyance, without any valuable confideration, be not according to the legal conftruction of the ftat. 27 *Eliz. c.* 4. fraudulent againft a fubfequent purchafer for a valuable confideration: or, in other words, whether in fuch cafe the law do not prefume fraud, without admitting fuch prefumption to be contradicted. The cafes in which the conftruction of the ftatute of the 27 of *Eliz.* has come on to be confidered have been numerous; and in feveral of thofe which arofe neareft the time of paffing the ftatute the Judges feem to have thought that a voluntary fettlement was only primâ facie fraudulent againft a purchafer, according to the language of the Court in Sir *Ralph Bovy's* cafe, *Ventris* 193.; where it is faid, (Lord *Hale* being Chief Juftice) "that though every voluntary conveyance carries an *evidence of fraud*; yet it is not upon "that account only *always* to be reckoned fraudulent, or "to be avoided by a purchafer for a valuable confideration." And in *Jenkins* v. *Kemifhe* or *Kemis*, which is to be found in *Hardrefs*, 398. and in 1 *Lev.* 150. in *Lavender* v. *Blackftone*, in 2 *Lev.* 146. and in *Garth* v. *Mois*, 1 *Keb.* 486.. the fame doctrine is diftinctly laid down; and in *Style*, 446. it is ftated to have been faid on a trial at bar, (Lord *Rolle* being then Chief Juftice) "that a voluntary conveyance upon confideration of na-

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"tural affection hath no badge of fraud, unless he who "makes it be indebted at the time or in treaty for the "sale of the lands:" which case Chief Baron *Gilbert* adopts, and supports by reasoning of his own, in his *Law of Evidence*, 235 (*a*). And in addition to these printed cases, Sir *Robert Eyre*, then Chief Justice of *C. P.*, according to a MS. Note formerly belonging to Mr. Justice *Clive*, in a case of *Standon* v. *Charlwood*, tried before him at the *London* Sittings after *Trinity* term 1732, laid it down, that a voluntary settlement, made upon marriage by Sir *Richard Anderson*, was not fraudulent *quia voluntary*; but the question was, Whether it was not made with an intend to defraud: and the jury so found it. And with this doctrine other of the cases which were cited by the counsel for the plaintiff may well agree, in which it is stated, "that conveyances were decided, *on evidence given at the bar*, to be fraudulent;" or, "that a jury were directed *on evidence*:" though it must be recollected that these cases are not so strong as those I have alluded to, as they are not inconsistent with the possibility of juries having been directed, what ought to be their *conclusion in point of law*, from the facts given in evidence, if the jury should find them to be true; for *fraud and covin is always a question of law*; it is *the judgment of law on facts and intents*. In a more modern case, where the question was upon the stat. 13 *Eliz.*, that of *Cadogan* v. *Kennet*, in *Cowper*, 434. Lord *Mansfield* said, obiter, "the stat. 27 *Eliz. c.* 4. does not go to voluntary conveyances, merely as being *voluntary*; but to such as are *fraudulent*." And in a late case, of *Doe* v. *Routledge*, in the same book, p. 705. where the question arose on the

(*a*) P. 201. in the edition of 1801.

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ſtatute now under conſideration, Lord *Mansfield*, in conſidering one point in the caſe, whether the ſettlement there under all its circumſtances were fraudulent and covenous, ſtated, " that in the ſtatute there was not a word that impeached voluntary ſettlements, merely as being *voluntary*, but as *fraudulent and covenous*;" and noticed the 3d ſection, which ſubjects parties to ſuch fraudulent grants, who ſhould attempt to defend them, to forfeiture and impriſonment, as if ſuch practices were a crime; in which light no perſon making a mere voluntary ſettlement, by way of proviſion for his family, was ever conſidered to ſtand. This ſection furniſhes moſt unqueſtionably a very ſtrong argument in favour of that conſtruction; and had theſe caſes not been oppoſed by many others of great weight and authority, there would have been but little doubt in our minds as to this conſtruction being the right one; but we have to deal with a claſs of caſes full as numerous, decided by Judges of the greateſt eminence, which have given this ſtatute a different conſtruction, and have held that a conveyance without a *valuable* conſideration is by the ſtatute made void, as fraudulent, againſt a ſubſequent purchaſer for *ſuch conſideration*. The earlieſt caſe in which this is diſtinctly laid down is *Woodie*'s caſe, cited by *Tanfield* in *Colvile* v. *Parker*, *Cro. Jac.* 158. as far back as *Eaſt.* 5th of *Jac.* 1., where it was adjudged, " that an aſſignment of a leaſe of lands by one quaſi in jointure to his wife, he taking the profits, and afterwards ſelling it without notice, was within the ſtatute; though not made in truſt to be revoked, nor with any clauſe of revocation; becauſe it was a voluntary conveyance at firſt, and ſhall be intended fraudulent at the beginning." In this caſe, though the perſon making the

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conveyance continued in possession and took the profits, it will be observed that there was no badge of fraud; as such possession accompanied and followed the deed: but the Judges might very well apprehend that subsequent purchasers might be continually defrauded by such secret conveyances, if they should be held good; and that when the question was between one, who had paid a valuable consideration for an estate, and another, who had given nothing, it was a just presumption of law, that such voluntary conveyance, founded only in considerations of affection and regard, if coupled with a subsequent sale, was meant to defraud those, who should afterwards become purchasers for a valuable consideration; and that a different construction would have so narrowed the operation of the statute as to leave the persons meant to be protected by it subject to almost all the mischiefs intended to be guarded against: and it certainly is more fit, upon the whole, that a voluntary grantee should be disapointed, than that a fair purchaser should be defrauded. In *Prodgers* v. *Langham*, 1 *Sid.* 133. a conveyance made by a man in trust for his daughter till marriage, for her maintenance, and then in trust to raise a portion for her, was held to be a voluntary conveyance in its origin, and void by the stat. 27 of *Eliz.* against purchasers for valuable consideration: this was in the 15th of *Car.* 2. In *White* v. *Hussey*, *Precedents in Chancery*, 14, in the beginning of King *William*'s reign, in the case of a conveyance, where the fraud, if any, was only from its being voluntary, the commissioners of the great seal were all of opinion that they might decree a conveyance fraudulent merely from being voluntary, and that, without any trial at law. In *Gardiner* v. *Painter*, *Cas. temp. King*, C. p. 65. Lord *King* said it could never be a question,

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whether a voluntary ſettlement be good againſt purchaſers. This was in the year 1726; and in the next year, in *Tonkins* v. *Ennis*, 1 *Eq. Caſ. Abr.* 334., a voluntary ſettlement was conſidered as being made void againſt a purchaſer by the ſtat. 27 of *Eliz.* And this could only have been ſo held from ſuch ſettlement being in point of law conſidered as fraudulent. In *White* v. *Sanſom*, 3 *Atk.* 412., though Lord *Hardwicke* is ſtated to have ſaid, that he had heard it ſaid in that court, that there are reaſonable voluntary conveyances, which that Court will not interfere to diſturb, upon the conſtruction of theſe ſtatutes; yet, according to the ſame caſe, he ſaid, "he hardly knew an inſtance where a voluntary conveyance had not been held fraudulent againſt a ſubſequent purchaſer." And in *Lord Townſend* v. *Windham*, 2 *Veſ.* 10. he ſaid, "on the 27th of *Eliz.* every voluntary conveyance made, where afterwards there is a ſubſequent conveyance made for valuable conſideration; *though no fraud* in that voluntary conveyance, nor the perſon making it at all indebted; yet the determinations are that *ſuch mere voluntary conveyance* is void at law by the ſubſequent purchaſe for valuable conſideration." In *Roe* v. *Mitton*, 2 *Wilſ.* 356. Lord Ch. J. *Wilmot* ſtated the queſtion to be, Whether there were a *good and valuable* conſideration to ſupport the limitation therein to *Thomas Hammerton*, the father of the leſſor of the plaintiff; or whether the limitation were *merely voluntary* under the ſtat. 27 of *Eliz.*, and bad againſt a purchaſer for valuable conſideration? And the Court held it good; as the mother giving up her charge of an annuity on the whole of the eſtate, and taking it on a part, was conſidered as a *valuable* conſideration. And Lord C. J. *De Grey*, in *Goodright* v. *Moſes*, in 2 Sir *W. Black.*

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Rep. 1019., laid it down, "that the deed in queſtion "was only a *voluntary* conveyance within the true mean- "ing of the ſtat. 27th of *Eliz.*; being founded only on a "*good*, and not on a *valuable*, conſideration; and *therefore* "could not be ſet up againſt a bonâ fide purchaſer." And the obſervation on this caſe made by the counſel for the defendant, that it ſeemed that Lord C. J. *De Grey* had been miſled by a caſe in 2 *Vern.* 326., which he referred to; and which was ſaid not to have been decided, and on which he was ſuppoſed to have relied; does not weaken the authority of the caſe in *Blackſtone*; for Lord C. J. *De Grey* referred to it, not to ſupport the opinion of the Court on the point now before us; but to ſhew that a leſſée for years was a purchaſer for a valuable conſideration. Lord *Mansfield* himſelf (whoſe opinion in *Doe* v. *Routledge*, and whoſe dictum in *Cadogan* v. *Kennet*, have been much relied on,) held in the caſe of *Chapman* v. *Emery*, *Cowp.* 280. that a *voluntary* conveyance after marriage by a man on his wife and children was *void* by the ſtat. 27th of *Eliz.* againſt a ſubſequent mortgagee, whom he held to be a purchaſer. And with reſpect to the caſe of *Doe* v. *Routledge*, it may be obſerved that Lord *Mansfield* ſeems to have ſupported his opinion by caſes, which were not conſidered as caſes of *voluntary* ſettlements; but as caſes where the ſettlements had for their foundation *valuable* conſiderations: ſuch was the caſe of *Newſtead* and *Searles*, in 1 *Atk.* 268. which he mentioned by name: for Lord *Hardwicke* in that caſe ſtated "the queſtion to be, Whether the articles of the 30th of *April* 1709 were for a *valuable* conſideration, and binding, or ought to be conſidered as *voluntary* and fraudulent, with reſpect to ſubſequent creditors and purchaſers?" And afterwards he ſaid, "I think the ſettlement *no voluntary*

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" agreement, but a binding one; the ſtatutes of the 13th " and 27th of *Eliz.*, that make conveyances fraudulent, are " voluntary conveyances made againſt purchaſers for a " valuable conſideration, or bonâ fide creditors; but it " would be difficult to ſhew that ſuch a limitation, as in " the preſent caſe, has been held fraudulent and void " againſt ſubſequent purchaſers and creditors. The pre- " ſent is a ſtronger caſe; for here are *reciprocal conſider-* " *ations*, both on the part of the huſband and wife, *by* " *the proviſions under the articles for the ſecond marriage.*" And I believe, if it were neceſſary to go into the examination, it would be found that in moſt, if not in all of the caſes cited by the defendant, there were reciprocal conſiderations; ſome benefit acquired by the perſons making the ſettlement, which might fall under the denomination of a valuable conſideration; though perhaps other perſons derived a benefit from the ſettlement, who were not the principal objects of it. As in *Jenkins* v. *Keymys*, where the conſideration of a marriage and marriage portion was held to run through all the eſtates raiſed by the ſettlement on the marriage; though the marriage was not concerned in them. And it muſt be further recollected, with reſpect to *Doe* v. *Routledge*, that upon the ſtrength of the voluntary ſettlement in that caſe *a marriage was had;* which was noticed by Lord *Manſfield*. And according to the caſe of *Prodgers* v. *Langham*, 1 *Sid.* 133. a voluntary conveyance, fraudulent againſt a ſubſequent purchaſer, was held to be *made good by a ſubſequent marriage*. And it will be further recollected, that in *Doe* v. *Routledge* there was *no bonâ fide purchaſer*. Subſequently to the caſe of *Chapman v. Emery*, the caſes of *Evelyn* v. *Templar*, 2 *Bro. Chan. Caſ.* 148. and *Doe ex dem. Bothell* v. *Martyr*, 1 *Boſ. & Pull.*

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New Reports, 332. have been determined: in the last of which it was laid down, "that it cannot now be held "that a prior voluntary conveyance shall defeat a con- "veyance to a purchaser for a valuable consideration, "without overturning the settled and decided law." And in the first of them (*i. e.*) *Evelyn* v. *Templar*, it was said by Lord *Thurlow*, *that so many estates stand upon the rule, that it cannot be shaken.* And so late as *Mich.* term 1804, in the case of *Doe d. Lewis* v. *Hopkins*, the Court of Exchequer held; where after marriage a man cove- nanted to stand seised of an estate to the use of himself for life, remainder to the use of his wife for life, remain- der to the heirs of the body of the wife begotten by the husband; that such settlement was void, as being volun- tary against a lessee of the husband for 31 years; the son of the settlor claiming the estate after his father's death against the lessee. To the authority of these cases may be added the case of *Nunn* v. *Wilsmore*, 8 *Term Rep.* 528. where Lord *Kenyon* said, "if this deed were either "actually fraudulent, or *voluntary*, *from whence the law* "*infers fraud*, the consequence insisted on by the plain- "tiff would follow; and I admit that if this deed were "a *voluntary* deed, *the law says it is fraudulent.*" Thus stand the authorities on both sides of the question; and the weight, number, and uniformity of those which esta- blish the point contended for on behalf of the plaintiff, do in our opinion very much preponderate: and as many estates depend upon the rule, it ought not, we conceive, to be shaken. It appears from the MS. note I have cited, formerly belonging to Mr. Just. *Clive*, that Mr. *Horsman* in the year 1713 advised the making a mortgage of the estate settled in strict settlement by Sir *R. Anderson* after his marriage; thinking it voluntary and fraudulent as against

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a purchaser, and the like advice as that which he gave nearly a century ago, probably had been given before: and that it has been given since, and acted on, we cannot doubt; as Lord *Thurlow* was not likely to have expressed himself, as he did in *Evelyn* v. *Templar*, unless he had known that such had frequently been the case. Feeling ourselves pressed with these authorities and considerations, we think ourselves bound to give judgment for the plaintiff. Much property has, no doubt, been purchased, and many conveyances settled upon the ground of its having been so repeatedly held, that a voluntary conveyance is fraudulent, as such, within the stat. 27th of *Eliz.*: and it is no new thing for the Court to hold itself concluded in matters respecting real property by former decisions upon questions, in respect of which, if it were res integra, they probably would have come to very different conclusions. And if the adhering to such determinations is likely to be attended with inconvenience, it is a matter fit to be remedied by the Legislature, which is able to prevent the mischief in future, and to obviate all the inconvenient consequences which are likely to result from it, as to purchases already made. And we cannot but say, as at present advised, and considering the construction put on the statute, that it would have been better if the statute had avoided conveyances only against purchasers for a valuable consideration, *without notice of the prior conveyance.* Our opinion being with the plaintiff, the consequence is that there must either be a new trial, or an issue between the plaintiff and the defendant *Goom* to try the validity of his lease.

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Wednesday, Nov. 25th.

GODSALL and Others *against* BOLDERO and Others.

A creditor may insure the life of his debtor to the extent of his debt: but such a contract is substantially a contract of indemnity against the loss of the debt; and therefore, if, after the death of the debtor, his executors pay the debt to the creditor, the latter cannot afterwards recover upon the policy; although the debtor died insolvent, and the executors were furnished with the means of payment by a third party.

THIS was an action of debt on a policy of insurance made the 29th of *Nov.* 1803, under seal of the defendants, as three of the directors of the Pelican Life Insurance Company, on behalf of the company; which recited that the plaintiffs, coachmakers in *Long-acre*, being interested in the life of the Right Hon. *William Pitt*, and desirous of making an insurance thereon for 7 years, had subscribed and delivered into the office of the company the usual declaration setting forth his health and age, &c. and having paid the premium of 15*l.* 15*s.* as a consideration for the assurance of 500*l.* for one year from the 28th of *Nov.* 1803, it was agreed that in case Mr. *Pitt* should happen to die at any time within one year, &c., the funds of the company should be liable *to pay and make good* to the plaintiffs, their executors, &c. within three months after his demise should have been duly certified to the trustees, &c. the sum of 500*l.* And further, that that policy might be continued in force from year to year until the expiration of the term of 7 years, provided the annual premium should be duly paid on or before the 28th of *November* in each year. The plaintiffs then averred, that *at the time of the making of the said assurance, and from thence until the death of Mr.* Pitt, they were interested in his life to the amount of the sum insured; and that they duly paid the annual premium of 15*l.* 15*s.* before the 28th of *Nov.* 1804, and the further sum of 15*l.* 15*s.* before the 28th of *Nov.* 1805; and that after that day, *and while the assurance was in force*, and *before the exhibiting the bill of the plaintiffs*, viz. on

on the 23d of *Feb.* 1806, Mr. *Pitt* died; that his demise was afterwards duly certified to the trustees, &c.; since when more than three months have elapsed before the commencement of this suit, &c.; but that the 500*l.* has not been *paid or made good to* the plaintiffs. There were also counts for so much money had and received by the defendants to the plaintiffs' use, and upon an account stated. To this the defendants pleaded, 1st, nil debent. 2dly, That the plaintiffs, at the time of making the assurance, and from thence until the death of Mr. *Pitt*, were not interested in his life in manner and form as they have complained, &c. 3dly, As to the first count, that the interest of the plaintiffs in the policy, and thereby intended to be covered, was a certain *debt* of 500*l.* at the time of making the policy, due from Mr. *Pitt* to the plaintiffs, and no other; and that the said debt afterwards, and *after the death of Mr.* Pitt, and *before the exhibiting of the plaintiffs' bill*, to wit, on the 6th of *March* 1806, *was fully paid to the plaintiffs* by the Earl of *Chatham* and the Lord Bishop of *Lincoln*, *executors* of the will of Mr. *Pitt*. Issues were taken on the two first pleas: and as to the last, the plaintiffs; protesting that their interest in the policy thereby intended to be covered was not the said debt mentioned in that plea to be due to them from Mr. *Pitt*, and no other; replied, that the said debt was not afterwards, and after the death of Mr. *Pitt*, and before the exhibiting of their bill, fully paid to them by the Earl of *Chatham* and the Lord Bishop of *Lincoln*, executors of Mr. *Pitt*, in manner and form as alleged, &c.: on which also issue was joined.

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The defendants paid 31*l.* (*a*) into court upon the first count: and on the trial of the cause before Lord *Ellenborough* C. J. at *Guildhall*, it was agreed that a verdict should be entered on the several issues, according to the direction of the Court, on the following case reserved.

The policy mentioned in the declaration was duly executed, and the premiums thereon were regularly paid. Mr. *Pitt*, mentioned in the policy, died on the 23d of *January* 1806; which event was duly certified in *February* 1806 to the trustees of the Pelican Life Insurance Company. The defendants, before *Trinity* term last, were served with process issued in this cause on the 3d of *June* 1806. Mr. *Pitt* was indebted to the plaintiffs at the time of the execution of the policy, and from thence up to and at the time of his death above 500*l.*, and died insolvent. On the 6th of *March* 1806 the executors of Mr. *Pitt* paid to the plaintiffs out of the money granted by parliament for the payment of Mr. *Pitt*'s debts, 1109*l.* 11*s.* 6*d.*, as in full for the debt due to them from Mr. *Pitt*. The case was argued in the last term by

Dampier, for the plaintiffs, who contended that they were entitled to recover upon this policy, notwithstanding the payment of the debt to them by Mr. *Pitt*'s executors out of the money granted by parliament for that purpose. It is clear that a creditor has an insurable interest in the life of his debtor, and the amount of the debt is the mea-

(*a*) There was some discussion in the course of the argument as to the sufficiency of the sum paid into court, in respect of the premiums received; the grounds of computing which did not distinctly appear. The defendant's counsel, however, denied the necessity of paying any thing into court, the risk having once commenced; and ultimately no opinion was given by the Court on this point.

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ſure of that intereſt; and ſo far the exiſtence and legality of the debt (*a*) is neceſſary to the validity of the inſurance in point of intereſt under the ſtat. 14 *Geo.* 3. *c.* 48.; but it is not the *debt*, quà *debt*, which is inſured, but the *life* of the debtor: it is only neceſſary that the intereſt ſhould exiſt at the time of the inſurance made, and continue up to the time of the death of the debtor, as it did in this caſe: and the ſum inſured having then become due, and the debtor's eſtate inſolvent, the fact of payment of the debt afterwards by a third party cannot be material; ſuch payment being altogether gratuitous. The validity of the inſurance depends upon its agreement with the ſtat. 14 *Geo.* 3. *c.* 48., which was made to prevent "inſur-" ances on lives or other events wherein the aſſured ſhall " have no intereſt:" and for this purpoſe it enacts (*ſ.* 1.) " that no inſurance ſhall be made by any perſons on the life of any perſon, &c. wherein the perſons for whoſe uſe, benefit, or on whoſe account ſuch policy ſhall be made, ſhall have no intereſt, or by way of gaming or wagering:" and it avoids every aſſurance made contrary to the true intent and meaning thereof. The 2d ſection prohibits the making any policy on the life of any perſon, without inſerting in it the perſon's name intereſted therein. And the 3d ſect. provides that " in all caſes " where the inſured hath intereſt in ſuch life, &c. no " greater ſum ſhall be recovered from the inſurers than " the amount or value of the intereſt of the inſured in " ſuch life," &c. Now here it cannot be diſputed but that all the requiſites of the act have been complied with. The only queſtion which can be made is upon the third ſection, as to the neceſſity of the intereſt continuing be-

(*a*) *Dwyer* v. *Edie*, *London* Sittings after *Hil.* 1788. *Park on Inſur.* 2d ed. 491. and 2 *Marſh. on Inſur.* 675.

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yond the time of the event happening on which the insurance is ſtipulated to be paid, and to the commencement of the action. But the intereſt need only continue up to the happening of the event inſured, when the cauſe of action ariſes; and that is the uſual averment in actions of this ſort: and the defendants by their third plea admit that it continued beyond that time; for they allege that the debt was paid *after* Mr. *Pitt*'s death, though before the action commenced. But if it had been neceſſary that the intereſt ſhould endure up to the time of the action brought, that ſhould have been averred; which has not been uſual; and for want of which the judgments in former caſes might have been arreſted. The hazard was run, for which the premium was received, during Mr. *Pitt*'s life; and as he died inſolvent, there was then as it were a total loſs: then the underwriters' liability cannot be adeemed by the voluntary payment of a third party, though through the hands of the debtor's executors. The very payment of the premium gave the plaintiffs an intereſt in the policy; and it could not have been in the contemplation of the Legiſlature when they granted the money for the payment of Mr. *Pitt*'s debts to adeem the riſk of underwriters. In the caſe of inſurances againſt fire, it never was conceived that the inſurers could avail themſelves pro tanto of charitable donations collected for the benefit of the ſufferers. In the caſe of a life inſurance, the premium is not calculated upon the riſk of the inſolvency of the perſon whoſe life is inſured, but ſolely on the probability of the duration of the life. But if the defendant's objection be well founded, every caſe of this ſort will be reſolved into an examination of the aſſets; of which the inſurers will avail themſelves pro tanto, after having had the benefit of the whole premium: and this too, at any

diſtance of time when aſſets may be forth-coming after the payment of the loſs. But, ſecondly, by the payment of money into court the defendants admit a continuance of the plaintiffs' intereſt on the policy beyond the amount of the bare debt; for it was paid in after the liquidation of the debt, and after the action commenced. And therefore the plaintiffs would be entitled to recover ſomething. And it does not appear how the premiums received have been reduced to the amount paid into court.

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Marryat, contrà, ſaid that he ſhould not now diſpute the propoſition, that a creditor might inſure the life of his debtor ſince the ſtatute; though it might have been doubted at firſt, whether ſuch an intereſt as that in the life of another were within the contemplation of the Legiſlature. There was an inception of the riſk on the policy; and therefore the premium was properly paid; and no queſtion can ariſe on the amount of it; this being an inſurance on a preciſe ſum, like a valued ſea policy. The only queſtion is, whether in the event the plaintiffs have been damnified, and can call upon the aſſurers for any indemnification. To purſue the metaphor; the ſhip inſured has been wrecked, but there has been a ſalvage, which the underwriters were entitled to, and out of which the aſſured have been indemnified: notwithſtanding which they ſtill claim as for a total loſs; contrary to the very nature of the inſurance, which is only a contract of indemnity. Admitting that the general form of the declaration in theſe caſes may have been ſuch as is ſtated; ſtill it is competent for the underwriters to ſhew that a ſalvage has been received by the aſſured to the whole extent of their loſs: and in no caſe can an aſſured recover double

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satisfaction whether from the same or any other person; as in the case of a double insurance: and therefore it is immaterial in this case from what hand the first satisfaction came. This principle was fully admitted in the case of *Bird* v. *Randall* (a), where it was applied to a case much stronger than the present. For there a servant having entered into articles to serve his master for a certain time under a penalty, and the servant having left his service before the time by the procurement of the defendant, this Court, in an action by the master to recover damages against the seducer, held that the master's having before sued the servant and recovered the penalty against him before the action brought against the seducer (though in fact the penalty recovered was not received till after the second action commenced, but before trial,) was a bar to such further remedy; considering the amount of the penalty as ample compensation for the injury received; and that no further satisfaction could be received from any other quarter. [Lord *Ellenborough* C. J. I never could entirely comprehend the ground on which that case proceeded. It was assumed that the sum taken as the penalty from the servant was the extreme limit of the injury sustained by the master: but there is the doubt: for the penalty might have been so limited, because of the inability of the servant to undertake to pay more; and yet it might have been very far from an adequate compensation to the master for the injury done to him by another who seduced his servant from him. I remember however a similar case tried at the sittings in the court of Common Pleas before Mr. Justice *Wilson*, sitting for the Chief Justice, who ruled the same point upon the dry authority of the former decision; but, as it seemed to me at the time,

(a) 3 *Burr.* 1345. 1 *Blac.* 373. 387.

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with confiderable doubt upon his mind as to the propriety of it. *Lawrence* J. I fuppofe the Court proceeded upon the ground that the penalty was by the exprefs ftipulation of the parties made an equivalent for the lofs of the fervice. Lord *Ellenborough*. That is fo as between the parties themfelves; but it may admit of doubt, whether that were the fair way of confidering it as againft a ftranger, a wrong doer.] A voluntary payment of another's debt, if accepted as fuch, will protect the debtor: and if fo, it will equally protect an infurer, under the ftatute. For the object of that was to prevent wager policies: but if this policy may be enforced, notwithftanding payment of the debt, every creditor may gamble upon the life of his debtor by way of infurance, though without any reafon to doubt of his folvency; and upon his *death he would be entitled to double fatisfaction of his debt. If a payment out of the debtor's affets would have been a bar to this action, it cannot enter into the merits of the cafe to inquire by whofe affiftance the executors have been enabled to make the payment. The money was paid by them, and received by the plaintiffs, as for the *debt* of Mr. *Pitt*. Then, 2dly, the payment of money into court on the firft count only admits the contract declared on. It admits that the plaintiffs had an intereft in the policy up to the death of Mr. *Pitt*, but not at the time of the action brought: and where a demand is illegal on the face of it, payment of money into court does not admit it (*a*). [It was afterwards ftated by the Court, and agreed on all hands, that the payment of money into court on the firft count only admitted the *facts* ftated in that count.]

(*a*) *Cox* v. *Parry*, 1 *Term Rep.* 464. and *Ribbans* v. *Crickett*, 1 *Bos.* & *Pull.* 264.

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Dampier, in reply, on the principal queſtion, ſaid that the facts of the caſe ſhewed that this was not a wagering policy; but that the plaintiffs had an intereſt in it up to the extent of the ſum inſured. And denied that the ſubſequent payment of the debt out of the grant of parliament was like the caſe of ſalvage on a marine policy: for that was an advantage calculated upon by the underwriters in fixing the amount of the premium; but here the ſolvency of the debtor formed no baſis of the calculation, but only the probable duration of his life. In *Bird* v. *Randall*, (beſides the doubt of the ſoundneſs of that deciſion) the penalty was conſidered as liquidated damages to the full extent of the injury: and the judgment recovered was conſidered as a ſatisfaction in law. If in this caſe the plaintiffs, after recovering judgment againſt the underwriters, had attempted to ſue Mr. *Pitt*'s executors, the caſes would have been more like. This ſtands as the caſe of a *gratuitous* payment by third perſons of the debt of another, and not as the ſatisfaction of a legal demand, nor upon a ſtipulation to receive it as ſatiſfaction of the preſent claim. It is moſt like the caſe of a charitable donation to ſufferers by fire who were partially inſured.

Curia adv. vult.

Lord Ellenborough C. J. now delivered the judgment of the Court.

This was an action of debt on a policy of inſurance on the life of the late Mr. *Pitt*, effected by the plaintiffs, who were creditors of Mr. *Pitt* for the ſum of 500*l*. The defendants were directors of the Pelican Life Inſurance Company, with whom that inſurance was effected. [His Lordſhip, after ſtating the pleadings and the caſe,

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proceeded—] This assurance, as every other to which the law gives effect, (with the exceptions only which are contained in the 2d and 3d sections of the stat. 19 *Geo.* 2. *c.* 27.) is in its nature a contract of *indemnity*, as distinguished from a contract by way of *gaming* or *wagering*. The interest which the plaintiffs had in the life of Mr. *Pitt* was that of creditors; a description of interest which has been held in several late cases to be an insurable one, and not within the prohibition of the stat. 14 *Geo* 3. *c.* 48. *s.* 1. That interest depended upon the life of Mr. *Pitt*, in respect of the means, and of the probability, of payment which the continuance of his life afforded to such creditors, and the probability of loss which resulted from his death. The event, against which the indemnity was sought by this assurance, was substantially the expected consequence of his death as affecting the interests of these individuals assured in the loss of their debt. This action is, in point of law, founded upon a supposed damnification of the plaintiffs, occasioned by his death, existing and continuing to exist at the time of the action brought: and being so founded, it follows of course, that if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. *Pitt*, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails. And it is no objection to this answer, that the fund out of which their debt was paid did not, (as was the case in the present instance,) originally belong to the executors, as a part of the assets of the deceased: for though it were derived to them aliundè, the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the

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assurance contract is alone maintainable, was fully obviated before their action was brought. This is agreeably to the doctrine of Lord *Mansfield* in *Hamilton* v. *Mendes*, 2 *Burr.* 1210. The words of Lord *Mansfield* are, "The "plaintiff's demand is for an *indemnity:* his action then "must be founded upon the nature of the *damnification*, "as it really is at the time the action is brought. It is "repugnant, upon a contract for indemnity, to recover "as for a total loss, when the event has decided that the "damnification in truth is an average, or perhaps no loss "at all." "Whatever undoes the damnification in the "whole, or in part, must operate upon the indemnity "in the same degree. It is a contradiction in terms, to "bring an action for *indemnity*, where, upon the whole "event, *no damage* has been sustained." Upon this ground, therefore, that the plaintiffs had in this case no subsisting cause of action in point of law, in respect of their contract, regarding it as a contract of *indemnity*, at the time of the action brought, we are of opinion that a verdict must be entered for the defendant on the first and third pleas, notwithstanding the finding in favour of the plaintiffs on the second plea.

Wednesday, Nov. 25th.

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The certificate of a bankrupt, allowed after the filing of the plaintiff's bill and before plea pleaded, is evidence to support the general plea in bar given by the stat. 5 *Geo.* 2. *c.* 30. *f.* 7. viz. that before the exhibiting the plaintiff's bill the defendant became a bankrupt, and that the cause of action accrued before he became a bankrupt.

THE plaintiff filed his bill as of *Trinity* term 46 *G.* 3. in assumpsit on a promissory note, made and given on the 4th of *August* 1798, by the defendant to the plaintiff, for 71*l.* 12*s.* 8*d.*, with interest at 4 per cent, on

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demand. There were alſo the common money counts in the bill. To this the defendant pleaded in *Mich.* term laſt, that the plaintiff ought not *to have or maintain* his aforeſaid action thereof againſt him; becauſe he ſays that after the making of the ſeveral promiſes in the declaration mentioned, and before the exhibiting the bill of the plaintiff, (to wit) on the 12th of *June* 1804, he, the defendant, became a bankrupt within the intent and meaning of the ſeveral ſtatutes, &c.: and that the ſeveral cauſes of action in the declaration mentioned accrued before ſuch time as he, the defendant, became a bankrupt: and concluded to the country. On which iſſue was joined. And at the trial at *Launceſton*, before *Sutton* B. a verdict was given for the plaintiff for 60*l.* 8*s.* 3*d.* ſubject to the opinion of this Court on the following caſe:

The plaintiff's bill was filed on the 5th of *September* laſt, as of the preceding *Trinity* term. The defendant pleaded the above plea on the 21ſt of *November* in *Michaelmas* term laſt. The defendant at the trial produced and proved his certificate, dated the 7th of *October* 1806, under the hands and ſeals of the commiſſioners named in a commiſſion of bankrupt againſt him on the 12th of *June* 1804, by virtue of which he was in due manner declared a bankrupt on that day. The certificate was allowed by the Lord Chancellor on the 20th of *November* laſt.

Burrough for the plaintiff. The queſtion is, Whether the bankrupt be entitled under the circumſtances to the plea of bankruptcy in the general form given by the ſtat. 5 *Geo.* 2. *c.* 30. *ſ.* 7.: but the benefit of that defence is only given to a bankrupt who obtains his certificate before

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fore the action brought: it is given to him solely on the ground of his *conformity* to the statute: and for the purpose of entitling him to the certificate of such his conformity many things are required by the 10th section; which ought properly to have preceded the 7th in its place in the statute. The discovery of the bankrupt's estate and effects is to be of no avail, unless the major part of the commissioners certify, that he has made a full discovery and conformed himself in all things according to the directions of the act, and that they have no reason to doubt of the truth of the discovery: and such certificate must be signed by 4-5ths in number and value of the creditors for above 20*l.*, who have proved their debts under the commission; and the commissioners must have proof by affidavit of such signing, &c.; which affidavit, &c. must be laid before the Lord Chancellor with the certificate: and the bankrupt must also make oath that the certificate and consent of the creditors were obtained without fraud: and then the certificate must be allowed by the Lord Chancellor: and after all, any of the creditors may be heard against it. All these things ought to be completed before the action brought; for how else can the certificate be pleaded in bar of the action, as in this case? If the plaintiff had a complete cause of action at the time of commencing his suit, and the defendant at that time had no defence, it is contrary to justice and legal analogy that any matter arising ex post facto should be a bar to the action. The only instance to the contrary is in the case of executors who may plead judgments confessed by them after the action brought in bar of it: but there the *fund* is sued, and not the party (*a*).

(*a*) Vide *Le Tret* v. *Papillon*, 4 *East*, 507, 8.

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And though in *Sullivan* v. *Montague* (*a*), and *Reynolds* v. *Beerling* (*b*), it was confidered that actio non, &c. went to the time of plea pleaded, and not to the commencement of the action; yet that was afterwards over-ruled in *Evans* v. *Proffer* (*c*). But the wording of the 7th fection, which gives the plea, fhews plainly that the full bar to the action was only meant to be given in this cafe where the certificate was obtained before the action brought; becaufe after difcharging the bankrupt, who fhall in all things have conformed to the act, from all debts due at the time he became bankrupt; (and till the certificate obtained and allowed it cannot be told whether he have fo conformed or not;) it proceeds, "and in cafe "any *fuch* bankrupt (that is, one who has fo conformed) "fhall *afterwards* be arrefted, profecuted, or impleaded "for any debt due before fuch time as he became bank-"rupt, he fhall be difcharged upon common bail; and "fhall and may plead in general that the caufe of fuch "action did accrue before fuch time as he became bank-"rupt," &c. and then it makes the certificate and allowance evidence of the bankruptcy, &c. It is clear that the general plea is only given in cafes where the action commenced *after* the *bankruptcy* (*d*); but the word *afterwards* applies as well to the *conformity* of *fuch* bankrupt as to his *bankruptcy*. And in *Langmead* v. *Beard*, at the *Middlefex* fittings after *Mich.* term 1792, Lord *Kenyon* C. J. held that a certificate granted after plea pleaded, but before the trial, would not avail at law. The words are "afterwards arrefted, profecuted, or impleaded:" but *impleaded*, which is the moft general word, muft mean the

(*a*) *Dougl.* 106.

(*b*) *M.* 25 *G.* 3. *B. R. ib.* 111. 2d edit. and 3 *Term Rep.* 188. n.

(*c*) 3 *Term Rep.* 186. (*d*) *Tower* v. *Cameron*, 6 *Eaft*, 413.

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original impleading in the action. The only object of the Legiflature in giving the general plea was to avoid the expence and prolixity of pleading all the fpecial matter, which before that act a bankrupt who fought to avail himfelf of his certificate was obliged to do, in anfwer to an action by a creditor whofe debt accrued before the commiffion; viz. the trading, act of bankruptcy, petitioning creditors' debt, the commiffion, and all other the previous proceedings requifite by the 10th fection to a valid certificate: but it never meant to give a different defence from what the bankrupt had before, or to give a more extended legal effect to the general than to the fpecial form of pleading. Then as in order to conftitute a legal bar to the action all the matter neceffary to conftitute a legal defence, if pleaded fpecially, muft have been alleged to have occured before the action brought; fo under this general form of pleading, the certificate neceffary to fubftantiate it at the trial ought to be fhewn to have exifted antecedent to the action. [*Lawrence* J. There is no claufe which fays that the certificate fhall be pleaded in bar to the action: it is the conformity to the ftatutes which gives the difcharge, of which the certificate is only the evidence. The ftatute only fays that "in cafe any *fuch* bankrupt (that is, who fhall have conformed in all things, as ftated in the preceding part of the claufe) fhall be arrefted, &c. for any debt due before his bankruptcy, he fhall be difcharged on filing common bail, &c. and then it gives the general bar. The 10th fection merely ftates the evidence of the conformity. Lord *Ellenborough* C. J. Suppofing no general plea had been given, the queftion would ftill have been the fame, whether the conformity did not give the difcharge? The latter part of the claufe only gives a compendious

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form of pleading the discharge.] No other evidence of conformity than the certificate could be admitted: it was therefore intended to be of the substance of the discharge; and must have been specifically alleged in pleading, but for the general form allowed; and if it did not exist before the action brought, it could not by the general rule of law have been pleaded as a bar to the action, but only as a bar after the last continuance, or after the action commenced.

Dampier, contrà. The bankruptcy of the party after the debt accrued, and his subsequent conformity, constitute the substantial defence to the action given by the statute: but the Legislature has required certain evidence of that conformity, which if obtained any time before the trial, and ready to be produced then, is sufficient. The necessity of conformity is stated in the 1st section, and is enforced by the penalty of death: the conformity therefore precedes the other steps to be taken. *Then the 7th section says that every bankrupt who shall conform as by the act is directed shall be *discharged* from all debts *due or owing at the time he became bankrupt:* and then, after giving the general plea, it says that the *certificate* and allowance shall be sufficient *evidence* of the trading, bankruptcy, commission, and *other proceedings precedent to the obtaining such certificate.* It is plain, therefore, that the conformity is the defence, and the certificate is merely evidence of the prior proceedings. The 10th section no otherwise applies to this subject than as it shews what guards the Legislature have thrown about the obtaining the certificate, which is to be evidence of such conformity, in order to prevent fraud. An argument arises upon the common form of the certificate, which con-

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cludes with ſtating that the bankrupt finiſhed his examination; and therefore ſuppoſes the conformity to end with the laſt examination; and not with the allowance of the certificate; which in fact forms no part of the conformity. If no general plea had been given, it would have been ſufficient to have ſtated the trading, bankruptcy, &c. examination, and the conformity; and it would not have been neceſſary to have ſtated the allowance of the Lord Chancellor. Great inconvenience and oppreſſion would enſue if a bankrupt were liable to the coſts of all the actions which might be commenced againſt him after the commiſſion iſſued, which certainly could not have been intended by the Legiſlature, while they were taking all his property from him. There is another exception to the general rule, beſides the caſe of executors, where matter ariſing after the action brought is pleadable in bar of it; namely, the outlawry of the plaintiff; as in *Moor* v. *Green* (*a*). But in no event could this have been pleaded as a plea puis darrein continuance, becauſe no continuance had in fact intervened between the bill filed and the plea: *Theo. Dig. b.* 14. *c.* 3. *ſ.* 10. It could only be pleaded as an original plea in bar; as in *Price* v. *Kenrick* (*b*), in the caſe of a releaſe after the action brought. [Lord *Ellenborough* C. J. obſerved that the caſe of a general releaſe did not apply, as that might releaſe the coſts incurred after the action brought, as well as what happened before.]

Burrough, in anſwer to the caſe of outlawry, ſaid, that the plea went to the very cauſe of action, which de-

(*a*) *Salk.* 378. But ſee for the general rule *Le Bret* v. *Papillon*, 4 *Eaſt* 402.

(*b*) *Fort.* 338.

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vested the plaintiff of his property and right to sue, and transferred them to the crown. As to the principal question, he argued that the certificate was so much of the substance of the defence, that if pleaded specially, the plaintiff might have traversed its existence, or replied per fraudem, or any of the circumstances mentioned in the 12th section which go to invalidate the certificate: but the Legislature would hardly have made so many distinct provisions for invalidating the effect of mere evidence. Again, if the certificate were merely evidence, the Lord Chancellor by his order, or this Court by mandamus, would, upon sufficient proof of the conformity, compel the commissioners to certify it: but such applications have always been refused (*a*); as being a matter entirely within the discretion and judgment of the commissioners. The justice of the case is also with the plaintiff, who by this form of pleading will be debarred of his costs by matter arising after his action was well brought: whereas by another form of pleading, viz. that pending the action the certificate was granted, and therefore that the plaintiff ought not *further* to proceed in his action, the defendant will still have the benefit which the certificate was meant to give, that of protecting him from the payment of the debt, but not of the costs before incurred.

This case was argued in the last term, and stood over for consideration till now, when

Lord ELLENBOROUGH C. J. delivered the opinion of the Court,—This was an action of assumpsit, to which the defendant had pleaded his bankruptcy, in the form prescribed by the stat. 5 *Geo.* 2. *c.* 30. *s.* 7. The facts were, that the plaintiff's bill was filed against the defendant,

(*a*) Vide Ex parte *John King*, 7 *East*, 92.

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fendant, an attorney, on the 5th of laſt *September* as of the preceding *Trinity* term. The defendant pleaded the above plea of bankruptcy on the 21ſt of *November* in *Michaelmas* term laſt: and at the trial produced and proved his certificate, dated the 7th of *October* 1806, under the commiſſion of bankrupt, iſſued againſt him on the 12th of *June* 1804, and under which he was duly declared a bankrupt on the 12th of *June* 1804. The certificate was allowed by the Lord Chancellor on the 20th of *November* laſt, the day before the plea was pleaded. It was contended on the part of the plaintiff, that the matter of the defendant's diſcharge, having ariſen after the filing of the plaintiff's bill, ſhould have been pleaded as a plea after the laſt continuance. To which it was, on the part of the defendant, anſwered, that if even the matter of the diſcharge grew by the allowance of the certificate, and was not merely to be proved in evidence by it; yet that even ſo; and if the allowance of the certificate were ſpecially pleaded; it could not be pleaded in terms as a plea *after the laſt continuance*, inaſmuch as no continuance had in fact intervened between the time of the bill filed and of the plea pleaded. It was further argued, on the part of the plaintiff, that this plea, and the general bar ariſing out of it, was only given by the ſtatute in favour of perſons conforming to the directions of the ſtatute, who ſhould "*afterwards* (that is, after "they had ſo conformed) be arreſted, proſecuted, or im- "pleaded, for any debt due before ſuch time as he, ſhe, "or they might become bankrupt:" and it was contended that the word "*afterwards*," by reference to the antecedent matter, applied only to caſes in which the action was commenced after the bankrupt had *already conformed*, and obtained his certificate in proof of ſuch his

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conformity. But it appears to us, on reference to the different provisions of the act, to have been the object of it, that every bankrupt who had obtained his certificate of conformity, and which had been duly allowed, should be thereupon, (that is, upon pleading such plea, and producing such his certificate) "*discharged from all his debts due or owing at the time that he did become bankrupt,*" for which he should have been impleaded *after* his bankruptcy; and that the discharge given him was meant to be a bar to all remedy by suit against him, commenced after his bankruptcy for debts due antecedent to his bankruptcy. The form of the plea given by the statute accords with this supposed intention and object of the Legislature, inasmuch as it alleges merely "that the cause "of such action accrued before the time he became a "bankrupt." This supposed intention of the Legislature in favour of the bankrupt, in part inferred from the language of the 7th section, is however further confirmed by adverting to the provisions contained in the 13th section: for by that section, a bankrupt having obtained his certificate, duly allowed, is, *if taken in execution for any debt due before his bankruptcy*, by reason that *judgment was obtained before his certificate was allowed*, entitled to be discharged out of execution, (*i. e.* generally as to *both debt and costs*) upon the production of his certificate before a judge. Whereas upon the principle contended for on the part of the plaintiff, the Legislature could only have consistently directed his discharge out of execution as to the *principal debt*; leaving him still liable for the *costs* of the action, at least for so much of them as had been incurred between the bringing of the action and the time of obtaining his certificate. Another argument in favour of the defendant arises from the 13th

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fection providing only for the relief of the bankrupt whofe certificate fhall be obtained *after* judgment: fo that a bankrupt who fhall obtain his certificate, after action brought and *before* judgment, would have no advantage of fuch certificate if the conftruction contended for by the plaintiff's counfel were to prevail. But we cannot fuppofe that it was the intention of the Legiflature, that the certificate of a bankrupt fhould prevent his creditor recovering againft him if his certificate were obtained before the commencement of the action; or having perfonal execution againft him if obtained after the judgment; and that he fhould ftill remain liable to his debts if he obtained his certificate after the commencement of the action, and before judgment. As we fee no poffible reafon for fuch a diftinction being intended, we think that the intention of the Legiflature, as collected from the act, muft be taken to be, that the bankrupt fhould be difcharged wholly from debt and cofts, if he obtained his certificate in time to plead it in bar of the action: and that as nothing is provided to the contrary, that fuch bar fhould have the ufual effect of entitling the defendant, upon its being found for him, to his cofts. And that if he obtained his certificate after judgment, and too late to plead it, that it fhould ftill be available for his difcharge out of execution for the debt and cofts: fo that in neither cafe the defendant fhould be fubject to cofts: but that if he obtained his certificate in time to fupport his plea, his plea fhould have the common effect of all other pleas in bar which are found for a defendant.

Judgment for the Defendant.

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The rule of construction as to slanderous words is to construe them in their plain and popular sense, such in which an ordinary hearer would have understood them at the time they were spoken. And therefore the defendant saying of the plaintiff, that "he "was *under a* "*charge of a* "*prosecution for* "*perjury*; and "that *G. W.* "(an attorney "of that name) "had *the Attorney-General's* "directions to "prosecute the "plaintiff *for* "*perjury*," is actionable. For after verdict (by which the jury who are to judge of the intent of the speaker, must be taken to have *negatived* that he meant to speak of a prosecution for a perjury which the plaintiff had *not* committed,) the words, not having been justified, must be taken to be *false*; and being unqualified by any context, and unexplained by any occasion to warrant them, the law infers *malice* from the *falsehood* of an accusation which, in the common acceptation of the words, impute *perjury* to the plaintiff.

Where new matter introduced by an innuendo, without any antecedent colloquium to which it can refer to support it, is not necessary to sustain the action, it may be rejected as surplusage. And therefore an innuendo, that *the Attorney-General* spoken of meant the Attorney-General for the county palatine of *Chester*, was so rejected.

IN an action on the case for slander, the plaintiff, after stating by way of introduction, that at the time of the slanderous words spoken, he was a practising attorney of the Court of Great Sessions for the county of *Flint*, and had conducted himself with integrity, &c. declared in the third count that the defendant *intending to injure and aggrieve* the plaintiff in his *good name*, character, &c. *and profession*, and *to cause it to be believed that the plaintiff was guilty of perjury, and that a prosecution for the crime of perjury was about to be commenced against him*, afterwards, &c. in a certain discourse, &c. falsely and maliciously, &c. said and published these false, scandalous, and malicious words following, of and concerning the plaintiff, viz. "He (meaning the plaintiff) is under a charge of a prosecution for perjury. *G. Williams* (meaning one *G. W.* an attorney) had the Attorney-General's directions (meaning the directions of his Majesty's Attorney-General for the county palatine of *Chester*) to prosecute (meaning to prosecute the plaintiff) for perjury. By reason whereof the plaintiff was injured and prejudiced in his good name, &c. and profession, and lost great gains which he would otherwise have acquired by his profession of an attorney." There was a 4th count for a written libel.

After a general verdict with joint damages on the whole declaration, *Burrough* moved in last *Trinity* term,

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in arreſt of judgment, and afterwards argued the caſe, together with *Topping*, for the defendant; and the *Attorney-General* and *Scarlett* were heard againſt the rule for arreſting the judgment. The caſes cited for the plaintiff, to ſhew that the words were in themſelves actionable, were *Haley* v. *Stanton*, *W. Jones* 299. and *Cro. Car.* 268. *Heynes* v. *Sprot*, *Cro. Jac.* 247. *Showell* v. *Hayman*, *ib.* 154. *Gainford* v. *Tuke*, *ib.* 536. And his counſel contended, that at any rate, if the third count were bad, the Court would not arreſt the judgment, but only award a venire de novo to have the damages ſevered by another jury. On the other hand were cited *Holt* v. *Scholefield*, 6 *Term Rep.* 691. *Steward* v. *Biſhop*, *Hob.* 177. *Powell* v. *Wind*, *ib.* 305. 327. *Bayly* v. *Churington*, *Cro. Eliz.* 279. *Weaver* v. *Cariden*, 4 *Rep.* 16. to ſhew that the words were not actionable, as not conveying any opinion of the ſpeaker upon the truth of the charge. And the innuendo, as to the Attorney-General of *Cheſter*, was objected to as not warranted by any antecedent colloquium. This caſe ſtood over for conſideration till this term; when

Lord ELLENBOROUGH C. J. delivered judgment.

This was a motion in arreſt of judgment in an action for words, in which a general verdict was found, with joint damages, upon the whole of the declaration. One of the counts, (the 3d) which it contained, has been argued on the part of the defendant to be bad on two grounds; 1ſt, that the words therein ſtated are not actionable, as not imputing to the plaintiff with ſufficient certainty the crime they point at, namely, that of perjury: and 2dly, becauſe as there is no colloquium reſpecting the Attorney-General of *Cheſter*, the innuendo, ſtating

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that "the Attorney-General" meant the Attorney-General for that county, vitiates the count, as being introductive of new matter. But we think that there is nothing in this laſt objection; for admitting moſt clearly, that new matter cannot be introduced by an innuendo, but that it muſt be brought upon the record in another way, when neceſſary to ſupport the action; yet where ſuch new matter is not, as here, neceſſary to ſupport the action, an innuendo, without any colloquium, may well be rejected as ſurpluſage; as it can have no effect in enlarging the ſenſe of the words uſed. If then the innuendo be ſtruck out of this count; as for the reaſon above given we think it may; the foundation of the ſecond objection is removed. The firſt objection turns upon the meaning of the words ſpoken of the plaintiff by the defendant. The words are theſe; "He is under a charge "of a proſecution for perjury. *Griffith Williams* (meaning an attorney of that name) has the Attorney-General's directions, (meaning the Attorney-General of the "county palatine of *Cheſter*) to proſecute (meaning to "proſecute the plaintiff) for perjury:" As it has been ſettled ever ſince the caſe of *Underwood* v. *Parkes*, 2 *Stra.* 1200. that the truth of the words cannot be given in evidence upon not guilty, but muſt be ſpecially pleaded; the words, not having been ſo juſtified, muſt be aſſumed to be falſe: and the words not being accompanied by any qualifying context, nor appearing to be ſpoken on any warrantable occaſion; as in a courſe of duty, or the like; ſo as to rebut the malice which is neceſſarily to be inferred from making a *falſe* charge of this kind; provided the charge itſelf is to be conſidered as a charge of the crime of *perjury*; the queſtion amounts ſimply to this, whether the words amount to ſuch charge; that is, whether they

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are calculated to convey to the mind of an ordinary hearer an imputation upon the plaintiff of the crime of perjury. The rule which at one time prevailed, that words are to be underſtood in mitiori ſenſu, has been long ago ſuperſeded; and words are now conſtrued by courts, as they always ought to have been, in the plain and popular ſenſe in which the reſt of the world naturally underſtand them. What then is the plain and popular ſenſe of theſe words; and what is the imputation meant to be conveyed by a perſon ſpeaking them *untruly* of another? They muſt mean, that he was ordered by the Attorney-General to be proſecuted; (and it is immaterial for this purpoſe, whether the Attorney-General of the county palatine or of *England* were meant;) either for a perjury which he had committed; or, which he had not committed; or, which he was ſuppoſed only to have committed. In the firſt ſenſe they are clearly actionable. In the ſecond, they cannot poſſibly be underſtood conſiſtently with the context. And if the defendant had uſed the words in the laſt ſenſe, the jury might have acquitted him, according to the doctrine in the caſe of *Oldham* v. *Peake*, both in the court of Common Pleas (*a*), and in this court (*b*); in which caſe when in the Common Pleas Mr. Juſtice *Gould* laid it down, " that what was the defendant's meaning was a fact for the jury to decide upon." And Lord *Mansfield* afterwards, when that caſe was brought into this court, by error, ſaid, " if (the words had been) ſhewn to be " innocently ſpoken, the jury might have found a verdict " for the defendant; but they have put a contrary con- " ſtruction upon the words as laid." And certainly, if the ſenſe of the defendant, in ſpeaking theſe words, had

(*a*) 2 Sir *W. Blackſtone*, 962. (*b*) *Cowp.* 278.

varied

varied from that afcribed to them by the plaintiff, he might by fpecially pleading have fhewn them not actionable, had he not chofen to have refted his defence merely on the general iffue. It appears therefore that thefe words muft fairly be underftood in the firft of thefe three fenfes; namely, that he was ordered to be profecuted for a perjury *which he had committed*; and, fo underftood, they are unqueftionably actionable. Thefe words are not lefs ftrong in effect than the words which were held actionable in one of the later cafes, that of *Carpenter* v. *Tarrant, Rep temp. Hardw.* 339. viz. "*Robert Carpenter* was "in *Winchefter* gaol, and tried for his life; and would "have been hanged had it not been for *Leggat*, for "breaking open the granary of farmer *A.*, and ftealing "his bacon." And without adverting to the long bead roll of conflicting cafes which have been cited on both fides in the courfe of this argument, it is fufficient to fay, that thefe words, fairly and naturally conftrued, appear to us to have been meant, and to be calculated, to convey the imputation of perjury actually committed by the perfon of whom they are fpoken; and that, therefore, the rule nifi for arrefting the judgment muft be difcharged.

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The KING *againft* the Inhabitants of BRADFORD.

Wednefday, Nov. 25th.

By the ftat. 35 *G.* 3. *c.* 101. *f.* 2. the party aggrieved by an order of juftices, directing payment, to the amount of above 20*l.* of the charges and cofts of the fufpenfion of an order of removal, on account of the illnefs of the pauper, may appeal to the next Seffions, in like manner as againft an order of removal, though he omit to give notice of fuch his appeal within three days after the demand of fuch charges and cofts; by which he makes himfelf liable to a diftrefs for the amount. And if on appeal the former order be vacated, or the amount of the charges to be paid be reduced, the furplus, if before levied by diftrefs, muft be refunded.

AN order was made on the 7th of *July* 1807, by two juftices of the peace for the county of *Wilts*, for the removal of *Sarah Spires*, a pauper, from *Bradford* to

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Melksham in the same county; and the justices at the same time made another order suspending the execution of the first, by reason of the sickness and infirmity of the pauper, pursuant to the stat. 35 *Geo.* 3. *c.* 101. *s.* 2.; and on the 16th of *Sept.* following they made a third order, directing the first order to be executed, and the sum of 41*l.* 14*s.* 9*d.*, expence which had been incurred by the suspension of it, to be paid by *Melksham* parish to *Bradford.* On the 17th of *Sept.* the pauper was carried to *Melksham*, and delivered to the parish officers there; and on the 1st of *Oct.* a notice of appeal was given by *Melksham* to *Bradford*; and a motion was made at the *Michaelmas* sessions following to enter and adjourn an appeal against the last order for the payment of the expences incurred by the suspension of the order of removal, under the before mentioned statute; which was agreed to by the Court; but they stated these facts specially, and reserved the question for the opinion of this Court, whether by the stat. 35 *Geo.* 3. *c.* 101. *s.* 2. any appeal were allowed to the quarter sessions, the appellants not having given notice of appeal *within three days* after the removal of the pauper to the respondent parish, as mentioned in that clause of the act; or whether the appellants were not concluded by their neglecting to give such notice from afterwards entering and prosecuting their appeal.

Casberd, in support of the jurisdiction of the sessions to hear the appeal, notwithstanding the want of notice within three days after the removal of the pauper, was stopped by the Court, who intimated that the words of the second clause giving the same power of appeal, as against an order of removal, were conclusive on the question.

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W. Williams, contrà, relied on the prior words of the clause, which directs that in case the parish officers to whom an order of removal has been directed, which had been suspended, and certain charges incurred in consequence of such suspension, " shall, upon the removal or " death of such poor person ordered to be removed, re" fuse or neglect to pay the said charges *within three days* " after demand thereof, and shall not *within the same time* " give notice of appeal, *as is hereinafter mentioned*," it shall be lawful for a justice of the peace to grant a warrant of distress to levy the charges and costs. It is true that the clause goes on to say, that if the charges and costs exceed 20*l*., the parties aggrieved by such order " may appeal to the next sessions against the same, *as they may do against an order for the removal* of poor persons *by any law now in being*:" but it never could have been intended that the appeal should be made after the charges had been actually levied by distress, when it before required notice of appeal *as thereinafter mentioned* to be given *within three days* after the demand made; but the subsequent general words must be construed with reference to the prior restriction as to the time of giving notice of appeal: and it must be understood altogether as directing, that if notice of appeal be given within the three days after the demand, and the sum exceed 20*l*., then the parties aggrieved may appeal against it, as they might do against an order of removal. The words, *as hereinafter mentioned*, are nugatory unless the proviso giving the appeal be connected with the antecedent notice of appeal, which is required to be given within three days. Besides, the clause goes on to direct, that if the Sessions, on the appeal, be of opinion that a less charge ought to have been paid, they are to amend the order, and direct that the amended or-

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der ſhall be *carried into execution* by the juſtices by whom the original order was made, &c. This again ſhews that the Legiſlature did not contemplate that there was to be any appeal after the original order had been already executed, and the larger ſum levied by diſtreſs for want of the notice of appeal within three days after the demand: nor has it made any proviſion for ordering the ſurplus levied on ſuch diſtreſs, beyond the reduced ſum directed to be levied by the Seſſions, to be refunded.

Lord Ellenborough C. J. The only conſequence to be deduced from the words of the clauſe, from the not giving notice of appeal againſt the charges within three days after the demand of them, is, that the party not giving ſuch notice within the time ſubjects himſelf to the inconvenience of a diſtreſs. But the ſubſequent proviſo giving the appeal is conceived in the moſt general terms, that the parties aggrieved may appeal to the next ſeſſions againſt ſuch order as they may do againſt an order of removal by any law in being. And it is not diſputed but that the preſent appeal was duly made, if it is to be regulated by the rules which govern appeals againſt orders of removal. But it is ſaid, that by reaſon of the antecedent words, "as hereinafter mentioned," referring to the appeal given by the latter part of the clauſe, we ought to import into that latter part words of reference to the former: but that would be to alter, and not to interpret the clauſe as it now ſtands; the meaning of which appears plainly to be this; if the party aggrieved by the order, and intending to appeal againſt the amount of the charges, will give notice of appeal within three days after demand made, he ſhall be relieved from the inconvenience of a diſtreſs; but though he neglect to do ſo, he

only subjects himself to that inconvenience; but his right of appeal, which is afterwards given, is not thereby taken away: and if he afterwards think proper to appeal within the time allowed by law for appeals against orders of removal, he is expressly empowered to do so. Then if the order should be wholly quashed, or the sum to be paid be reduced upon the appeal, no injustice will follow; for it is a consequence of law that the money paid upon an order which was afterwards vacated in whole or in part should be refunded by those who have received it; and if it were not repaid, an action for money had and received would lie to recover it back again.

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Per Curiam, Order of Sessions confirmed.

The KING *against* The Inhabitants of EVERDON.

Wednesday, Nov. 25th.

AN order was made by two justices of the peace on the 19th of *June* 1805 for the removal of *Sarah Ares*, a pauper, from *Everdon* to *Wappenham*, both parishes in the county of *Northampton*: and at the same time the justices made another order by virtue of the stat. 35 *Geo.* 3. *c.* 101. *s.* 2. to suspend the execution of the first, on account of the sickness and infirmity of the pauper, until it should be made appear to them that it could be safely executed: and by a subsequent order of the 3d of *December* 1806, reciting the death of the pauper, and that 20*l.* 8*s.* 6*d.* expence had been incurred by the suspension of the order of removal, the same magistrates directed the parish officers of *Wappenham* to pay that sum to *Everdon* on demand. Against this last order

Under the stat. 35 *G.* 3. *c.* 101. *s.* 2. an order of justices, suspending their order made for the removal of a pauper to his place of settlement, on account of sickness, may be made, though he were not *brought before the justices* at the time of such orders made: the plain intent and precise object of the statute being to extend the power of suspension to all cases where orders of removal may be made; and orders of removal may be made though the pauper to be removed be not brought personally before the magistrates; however fit that is to be done where it may be done.

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an appeal was lodged at the ensuing sessions, when the order was quashed, subject to the opinion of this Court upon a case stating, That the order for the removal of the pauper was made upon the examination of her father only, who swore *that the pauper from excessive infirmity and sickness was unable to be brought before the justices* who made the original order *for examination*; and that the said justices at the same time made the order for suspension. That on the 3d of *Nov.* 1805 the pauper died at *Everdon*, without ever having been removed to *Wappenham*; and that the same justices afterwards made the order in question for the payment of the 20*l.* 8*s.* 6*d.* charges. And that it was proved on the hearing of the appeal, that the pauper was not present before, or examined by, the said justices, when they made the order for the suspension of the order of removal, nor was she ever before them at all upon the business. The Sessions being of opinion that the justices had not power to grant the order of suspension without having the pauper before them to be examined, or without the justices visiting the pauper themselves, therefore quashed the order for the payment of the money founded thereon.

Dayrell, in support of the order of Sessions, relied upon the words of the stat. 35 *Geo.* 3. *c.* 101., the 2d section of which, giving the justices jurisdiction to suspend an order of removal made by them, on account of the sickness, &c. of the pauper, is expressly confined to cases where the pauper is *brought before the justices* for the purpose of being removed. And he also argued that the strict construction of the words was required by the evident meaning of the Legislature to submit the pauper to the view of the magistrates, so that they might judge from

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the evidence of their own ſenſes, as well as from other ſources of information, whether he were in a fit condition to be removed; for how elſe can it *appear to them* that he is unable to travel, &c.? Before this act the pariſh officers had a diſcretionary power of executing an order of removal when they thought proper; and the Legiſlature by this act intended to veſt that perſonal diſcretion in the magiſtrates.

Morice and *Sawbridge*, contrà. This is a remedial law, the object of which will be entirely fruſtrated by a literal conſtruction of the words of it. For on the one hand, it would be very inconvenient and burthenſome to require that, if the pauper cannot be brought to the place where the juſtices meet, by reaſon of ſickneſs or infirmity, they ſhould go to the place where the pauper is; and that, however dangerous it might be to them in caſe of contagious diſorders: or on the other hand, that the pauper muſt be brought before them, however unable to be removed without hazard of his life; which would defeat the very end of this humane regulation. The act could never be put in force except in ſlight caſes of illneſs. Neither can it anſwer any uſeful purpoſe, in moſt caſes, to require this perſonal inſpection of the magiſtrates; for unleſs they happened to be medical men, the mere view of the pauper could not afford them ſo much information, as to the real ſtate of his health, as the evidence of medical perſons. And there might be as much danger to the pauper himſelf in bringing him to the place where the juſtices meet, as to the place of his ſettlement. It clearly is not neceſſary, according to *Rex* v. *Bagworth* (*a*), that the pauper ſhould be preſent and exa-

(*a*) *Cald.* 181.

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mined for the purpofe of founding an order of removal; though if it be convenient, it is fit and proper to be done. In fome cafes, fuch as infancy and lunacy, it would be ufelefs to do fo. Where a literal conftruction of an act would go befide the plain meaning and intent of it, there are feveral inftances in the poor laws of a ftill greater departure from the letter, in aid of the fpirit, of an act, than that now propofed. The ftat. 5 *Eliz. c.* 4. requires the binding of an apprentice for feven years; and the 41ft fection avoids all indentures, &c. of apprenticefhip made otherwife than according to that law; yet it has been holden (*a*) that indentures for a lefs time are voidable only as between the parties. So the ftat. 3 *W.* & *M. c.* 11. *f.* 7. fays that "any unmarried perfon, *not having* "*child or children*," may gain a fettlement by hiring and fervice for a year; and yet a widower having children *who have gained fettlements in their own right* has been deemed competent to gain a fettlement (*b*), becaufe within the reafon, though certainly not within the words of the law. So in *Rex* v. *Iflington* (*c*), the 4th fection of the act in queftion, which provides that no perfon who *fhall come* into any parifh fhall gain a fettlement by being rated to any tenement under 10*l.* a year value, was held to extend to perfons who were in the parifh at the time of paffing the act. In order therefore to put a reafonable and practicable conftruction upon the words, "in cafe any poor perfon fhall be *brought before any juftices of the peace* for the purpofe of being removed," &c. they muft be conftrued to apply to the bringing the cafe of a pauper judicially before the magiftrates for that purpofe.

(*a*) *Rex* v. *St. Nicholas*, in *Ipfwich*, *Burr. S. C.* 91.

(*b*) *Antony* v. *Cardenham*, *Fort.* 309. *Foley*, 131.

(*c*) 1 *Eaft's Rep.* 283.

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Lord ELLENBOROUGH C. J. I hope that the apparent juſtice of the one conſtruction, and the great and manifeſt inconvenience of the other, do not too much warp my mind in coming to the concluſion which I have done: for it would indeed be a grievous conſtruction if we were bound to adopt the literal ſenſe of the words of the ſtatute which have been commented on. But I hope we ſhall do no violence to the words, and I am ſure we ſhall not violate the ſpirit of the act, by conſtruing the words, " in caſe any poor perſon ſhall from henceforth be " brought before any juſtice or juſtices of the peace for " the purpoſe of being removed," to mean, in caſe a queſtion concerning the removal of any poor perſon, or if the caſe of any poor perſon, ſhall be brought before the juſtices of the peace for the purpoſe of his removal, &c. The language of the act adverts to the caſe which moſt generally happens, where the pauper is brought in perſon before the magiſtrates to be examined as to his ſettlement; but that is not neceſſary to be done in all caſes, as appears from what was ſaid by Mr. Juſtice *Buller* in *The King* v. *Bagworth*, who denied that there was any ſuch general rule, as that it was neceſſary for the pauper to be examined; and he inſtanced the caſe of infants of tender years, where it is plainly impoſſible. And he referred to a caſe from *Comberbach*, 478. where Lord *Holt* ſaid that " if it can be, it is fit it ſhould be ſo, but not abſolutely neceſſary." And as it would be uſeleſs in caſes of infancy or lunacy, ſo it might be dangerous to the magiſtrates themſelves, in the caſe of infectious diſorders, to go to the pauper to take his examination in perſon: and to bring him before the magiſtrates would be, in caſes of extreme ſickneſs or infirmity, to expoſe him to the very miſchief which the act was intended to remedy. All therefore

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therefore that the act meant was, not that where any pauper was brought personally, but where his case was brought judicially before the magistrates, for the purpose of his removal, that they should have power to suspend the execution of the order of removal, if it appeared to them, that is by due examination of the facts, that from sickness or infirmity of the party the removal could not then safely be made. This is the plain sense and spirit of the act, though somewhat straining upon the words of it: but no other construction can be put upon them consistently with the general object of the act. And in doing this, we do not go further against the letter of the act than was done in the case referred to of *Antony* v. *Cardenham*; where the description of a person, *not having any child*, was construed to mean not having any child which could be a burden to the parish where the father was hired and served.

Grose J. The letter of the statute is sufficiently plain according to the common understanding of the words; but that would militate so strongly against the spirit and object of it, that we cannot be governed by the letter without entirely defeating this very wholesome law. In many cases where it might be necessary to ascertain the settlement of a poor person, the removal of him from a sick bed to be carried before the magistrates for that purpose might even occasion his death; when it was the professed object of the law to guard against any risk of his personal safety, by enabling the justices to suspend the execution of the order of removal till it could be done without danger to the party.

Law-

LAWRENCE J. The drawer of the act probably conceived that a poor person was always carried before the magistrates at the time of the order of removal made: it is usual indeed so to do; but it is not necessary, as appears from the cases which have been cited. But having assumed that to be the constant practice, then the object of the provision was, that in *all* cases of orders of removal made, the magistrates should exercise their discretion whether the paupers were in a fit condition to be removed at the time without danger to them: and if not, to enable the magistrates to suspend the execution of the order till they were satisfied that it might safely be executed. The letter of the act to be sure is confined to the case of any poor person *brought before* the magistrates for the purpose of being removed; but so to construe the act would be to draw poor persons in many instances from the bed of sickness; and in case of dangerous accidents happening at a distance from the place where the magistrates met, to prevent them from having the benefit of the act at the very time when they stood most in need of it. By construing, therefore, the act in the way we now do, we give effect to the plain intention of it, though the words used are not the most apt to express that intention.

LE BLANC J. I agree with the rest of the Court in the construction they have put upon the act: for a contrary construction would give effect to the letter by the repeal of the very object of the statute. Though I cannot agree that every case where a construction has been put upon a statute, in some instances directly contrary to the words of it, is a fit precedent to be followed by us. In the present case, it is quite clear what

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what the object of the Legiflature was. Poor perfons were before this act liable to be removed on being only *likely to become chargeable:* that provifion was repealed, and they were only fubject to be removed upon becoming *actually chargeable.* But it was forefeen that the very circumftance which would moft probably render them chargeable was ficknefs: therefore when the Legiflature authorized their removal when actually chargeable, it guarded againft the improper exercife of it in cafe of ficknefs or other infirmity by enabling the magiftrates to fufpend the execution of the order of removal, under fuch circumftances, till they were of opinion that it could be fafely executed. Then this intention of the Legiflature would be entirely defeated if we were to hold, that in the very inftances to which they looked as improper for poor perfons to be removed, and in which they authorized the magiftrates to fufpend the execution of the order, the parties fhould not have the benefit of the provifion unlefs they were brought before the magiftrates.

Order of Seffions quafhed.

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Thurſday, Nov. 26th.

The ſtat. 23 *H.* 8. c. 5. *ſ.* 17. having directed that "*Laws, acts,* " DECREES, " *and ordinances*" made by commiſſioners of ſewers ſhall ſtand good and be put in execution *ſo long time as their commiſſion endureth, and no longer,* except "the ſaid laws " and ordinances" be engroſſed in parchment, and certified under the ſeals of the commiſſioners into Chancery, and have the Royal aſſent: and the ſtat. 13 *Eliz. c.* 9. having directed all commiſſions of ſewers to continue in force *for* 10 *years*, unleſs ſooner determined by ſuperſedeas or any new commiſſion; and that all *Laws, ordinances, and conſtitutions,*" made by force of ſuch commiſſion, *being written in parchment, indented, and under ſeals,* &c. ſhall, without ſuch certificate, or Royal aſſent, continue in force notwithſtanding the determination of the commiſſion by ſuperſedeas, until repealed or altered by new commiſſioners; and that all ſuch *Laws, ordinances, and conſtitutions,* written *in parchment, indented, and ſealed,* &c. ſhall, without certificate or Royal aſſent, continue in force *for one year* after the expiration of ſuch commiſſion by lapſe of 10 years from its teſte: held,

1. That the *Laws, acts, decrees, and ordinances,* mentioned in the ſtat. of *Hen.* 8. mean the ſame as the *Laws, ordinances, and conſtitutions,* mentioned in that of *Elizabeth.* And,

2. *That a *decree* made by commiſſioners under a former commiſſion which had expired by lapſe of 10 years, directing a ſea wall to be refounded, which had been deſtroyed by a violent tempeſt and inundation, and the ſums neceſſary for its conſtruction to be advanced by thoſe who were before bound to ſuſtain it ratione tenuræ, (and who did advance the money accordingly), and that a rate ſhould be made on the Level for their reimburſement; (although ſuch decree had been written *in parchment, indented, and ſealed*; which this was not,) could not be enforced by commiſſioners under a *new* commiſſion, iſſued more than a year after the expiration of the former commiſſion; as to ſo much of it as remained unexecuted: though good to the extent to which it had been executed: and therefore this Court refuſed a mandamus to the new commiſſioners to direct a rate to be levied on the Level for the reimburſement directed by the decree.

A Writ of mandamus iſſued to theſe commiſſioners, reciting that at a court of ſewers holden at *Bridgewater* on the 29th of *June* 1799, before *Jefferys Allen,* and other commiſſioners there named, they made a certain order and decree under their hands and ſeals, whereby, after reciting that it appeared to them, as well on a ſpecial view and ſurvey taken by the ſaid *J. A.* &c. of the place in the pariſh and Level of *Huntſpill* in the ſaid county where a ſea wall (deſcribing it) lately ſtood; as by the preſentment *of the jurors of the ſaid pariſh of* Huntſpill duly ſworn before the ſaid commiſſioners aſſembled at the ſaid court, and which preſentment was returned to the ſaid court; that a new ſea wall of different ſize and dimenſions was become neceſſary to protect the Level from inundations of the ſea: and that it further appeared from the ſaid preſentment that the late ſea wall was in good repair before a violent ſtorm which happened on the 10th

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of *Sept.* 1798, which threw down and destroyed it on that day and on other days between that and the 1st of *December* following, without any default of the Marquis of *Buckingham*, *R. Jeffery*, &c. who before then were bound to repair it in certain proportions, by the extreme and unusual violence of the winds and sea: and that the breach made in the land was daily increasing, &c.; it was by the commissioners so assembled ordered and decreed, that a new wall of larger size and dimensions and upon a different principle should be constructed, sufficient to protect the Level, &c. as near as might be on the line of the old wall; and that all persons who held any lands, &c. within the Level, who had or might have any loss or disadvantage by inundations of the sea for want of a sufficient wall there, or who had or might have any benefit by preventing such inundations, ought to be charged with erecting the new wall, &c. And by the same decree the commissioners deputed *C. C.* to survey the Level, &c.; and further ordered, that the Marquis of *Buckingham*, *R. Jeffery*, &c. (and the others who were before bound to the repair) should from time to time advance to the collector in the order named 3000*l.* 1*s.* 10*d.* which the commissioners adjudged to be necessary for the construction of the new sea wall; and which sum was to be repaid to the same persons out of the sum to be raised by a rate or assessment thereafter to be made. And by their decree they also appointed *R. Symes* to be collector of the rate, and *T. Dean* expenditor of the money so to be advanced in building the wall, to whom *R. Symes* was to pay over the money collected by the rate. The mandamus then further reciting, that a great part of the new wall had been constructed in pursuance of the said order and decree, and 1900*l.* expended upon it, advanced by the Marquis

quis of *B.*, *R. Jeffery*, &c. in obedience thereto: and that in *Easter* term 43 *Geo.* 3. a mandamus issued to the *said late commissioners* of sewers for the said county, commanding them to make a rate on the Level for repaying to the said Marquis of *B.*, *R. Jeffery*, &c. the sums so expended and advanced by them; and that the said *late* commissioners had due notice of the said writ; and that certain proceedings afterwards had before them, respecting the making such rate, were quashed by the Court of K. B. for illegality: and reciting the complaint of the Marquis of *B.*, *R. Jeffery*, &c. that they had required the *now* commissioners (the defendants) to make a rate on the said Level for reimbursing the complainants, which the *now* commissioners had refused to do: therefore the writ commanded them to make a rate on all persons having or holding messuages, lands, tenements, or hereditaments within the said Level of *Huntspill* who had or might have hurt or disadvantage by inundations of the sea for want of a sufficient sea wall there, or who had or might have benefit by preventing such inundations, for repaying to the Marquis of *B.*, *R. Jeffery*, &c. the money advanced by them to the collector beyond their proportions of the expenditure in making the new sea wall.

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To this writ the now commissioners made a special return; stating that they were appointed by virtue of a commission under the Great Seal, dated the 15th of *April* 1806, and that the former commissioners (naming them, amongst whom were many of the present commissioners) acted under a commission dated the 13th of *April* 1795, which expired on the 13th of *April* 1805, according to the form of the statute. That within the Level of *Huntspill* there are and have been as far back as can be traced several districts or divisions, of known boundaries, (amongst

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(amongst others the district of *Huntspill*) for each of which there has always been, as far back as can be traced, what is called a *standing jury*, constituted thus: on the issuing of a new commission of sewers for the county, the commissioners issue their precept to the sheriff to summon juries for the different districts within the said Level; and the sheriff thereupon summons such persons residing in or near the respective districts, to serve as jurors for the same respectively, as have the best local knowledge and information respecting the matters which may fall under their cognizance; and such jurors are in each district more or less numerous according to its extent. That the jurors so summoned appear at the next sessions of sewers, and severally nominate one of those summoned out of each district for the foreman of the jury of that district. That at such sessions the several juries are sworn before the commissioners (*a*). That every juryman so returned and sworn usually continues for life, unless discharged by the commissioners for good cause; in which case some other person is in like manner summoned and sworn into and upon the same jury. That at the times after mentioned *T. Dean*, *R. Jeffery*, &c. (18 in number) were *the standing jury for the said parish of* Huntspill, one of the said districts, and were all of them resident in or near that parish, and were called *the Huntspill jury*, of which *T. Dean* was the *foreman*. That at a sessions of sewers held at *Bridgewater* on the 21st of *June* 1799 before *Jefferys Allen*, &c., then commissioners, it was ordered that the clerk of the sewers should issue a precept and summons thereon to *T. Dean*, foreman of the *Huntspill* jury, to appear at a sessions of sewers at *Bridgewater* on the 29th

(*a*) The form of the oath which was here set forth is the same as is noted in 7 *East*, 72. (*a*).

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of *June* 1799, to make their presentments: and that the said late commissioners did at the same sessions issue a precept under their hands and seals to the sheriff of the county, requiring him "forthwith to issue his warrants and cause to be summoned the *several juries of sewers* and other persons fit to serve on such juries belonging to the western division of the said county, personally to appear at a sessions of sewers at *Bridgewater* on the 29th of *June* 1799, to make presentments of and return on oath all impediments, &c. within their respective views, and also through whose default they have happened, and by whom they ought to be reformed," &c.; which precept was delivered to the sheriff on the 21st of *June* 1799, who on the same day issued the following precept: "*Somerset*, to wit. *J. B.*, sheriff of the said county, to Mr. *Thomas Dean*, *foreman of the* Huntspill *jury of sewers*, greeting. By virtue of a precept to me directed under the hands and "seals of six commissioners of sewers, &c., these are to "give you notice, that you do appear *with the rest of your* "*jury* at a sessions of sewers at *Bridgewater*, &c. on the "29th of *June* instant, &c. to make returns of and pre-"sent on your oaths the several impediments, &c., and "that you make a return of your precept," &c. Dated 21st of *June* 1799: which precept was on the same day delivered to the said *Thomas Dean*, *so being foreman of the said jury*; and that *no other precept or summons whatsoever was issued either by the then commissioners of sewers, or by the sheriff, his under-sheriff or deputy, to summon any jury of the body of the county, or any jury whatsoever, for any purpose whatsoever*, at the said sessions of sewers, held at *Bridgewater* on the 29th of *June* 1799, except as abovementioned. That *Thomas Dean*, as such foreman, did in pursuance of the sheriff's precept *summon the residue of*

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such standing jury for the parish of Huntspill to appear at the said sessions on the 29th of *June* 1799; and at that sessions before *Jefferys Allen*, &c. then commissioners of sewers for the county, *Thomas Dean* appeared with the sheriff's precept, and the said (jurymen, by name,) having been summoned by *T. Dean*, but by no other person whatsoever, *as the standing jury for the parish of* Huntspill; and they were then and there sworn before the said then commissioners, and took the oath before-mentioned; and thereupon presented, &c. [Here the presentment was set out, describing it to be by *the jurors of the parish of* Huntspill; and stating in substance what was set out in the mandamus.] Whereupon the then commissioners, on such presentment made by the jury so summoned, did at the same sessions make the order and decree in the writ mentioned: but that *no presentment was made to the said sessions of sewers by any jury summoned and returned from the body of the county of* Somerset, nor was any such jury for that purpose summoned and returned out of the body of the county; nor any other presentment made by any person, except as above set forth. For which reason the commissioners (defendants) suggest that the presentment so made was invalid in law, and cannot safely be proceeded upon by them, and that they ought not to make any rate as they are commanded by the writ.

Several objections were taken to this return on the part of the prosecutors. 1st, That the decree of the 29th of *June* 1799, founded upon actual survey by the commissioners, and the presentment of the standing jury, was the judgment of a court of record, and that the defect of summons of such jury could not now be inquired into. 2dly, That the jurymen had all been originally selected by the sheriff, summoned by him, and sworn upon the

the ſame jury: and that it appears by the return that they were, in conſequence of the ſheriff's precept delivered to the foreman, by him ſummoned to appear before the commiſſioners at the court of ſewers by which the decree was made. 3dly, That the appearance of all the jurors cured the defect of formal ſummonſes by the ſheriff, if in fact there were any ſuch defect.

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But on the firſt day when this caſe came on to be argued in laſt *Trinity* term, *The Court* intimated great doubt upon a preliminary point; whether, as the decree of the 29th of *June* 1799 was not fully executed and carried into effect during the exiſtence of the former commiſſion under which it was made, which expired on the 13th of *April* 1805 by lapſe of time, according to the proviſions of the ſtat. 13 *Eliz. c.* 9. limiting the duration of every ſuch commiſſion to 10 years; or at leaſt within one year afterwards in reſpect to ſuch proceedings as are mentioned in the 2d ſection of that act; ſuch decree were now capable of being executed by the new commiſſioners, whoſe commiſſion is dated the 15th of *April* 1806; the ſtat. 23 *Hen.* 8. *c.* 5. having directed that ſuch laws, acts, *decrees*, and ordinances, as ſhall be made by the commiſſioners, ſhall ſtand good and be put in execution *ſo long as their commiſſion endureth, and no longer.* And they directed that the caſe ſhould ſtand over till the next Crown Paper day, in order to give the counſel an opportunity of conſidering this objection. When

Burrough for the proſecution argued (*a*), that the obligation to provide, repair, and maintain ſufficient defences

(*a*) Only ſo much of the argument on either ſide is noticed as applies to the preliminary point ſuggeſted by the Court; on which alone the judgment ultimately turned.

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against the inundations of the sea over the different Levels exposed to its ravages, arose at common law, and not upon the statute of *H.* 8. The decree, the validity of which cannot for the reasons before stated be now impeached, is only referred to as *evidence* of the obligation of the Level to repair in this particular instance, and merely inducement to the mandatory part of the writ. And this decree having in all material points been already carried into execution; and the money having in virtue of it been paid and laid out by the parties named; the law infers an obligation that they shall be reimbursed by a rate on the Level, which has been so found to be benefited by it. It appears all through *Callis's* Treatise, by writs in the Register (*a*), by several cases in Lord *Coke's* Reports (*b*), and even by the stat. 23 *H.* 8. *c.* 5. that the general onus of repairing sea banks, &c. was not laid by that statute, but arose out of the ancient prerogative of the Crown. For at common law the King was bound to save and defend the realm from the dangers of the sea as well as against enemies; and commissions of inquiry were used to be granted for this purpose. And in case of damage by extraordinary tempest, which superseded the obligation of individuals to repair, it seems that the Crown used to make the repairs, and afterwards the expences were levied upon the Level by a rate. The regulations therefore of the statute of *H.* 8. do not affect the operation of this decree; because the thing decreed has been done; the decree remains conclusive evidence on record of the obligation of the persons, having lands &c. in the Level, to repair the wall in question; and the

(*a*) These are referred to in 10 *Rep.* 141. *b.* 142. *Register*, 127, 8.

(*b*) Vide *Keighley's* case, 10 *Rep.* 140. The case of the *Isle of Ely*, *ib.* 141. and others there referred to.

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ending of one commission cannot do away the right of another to enforce the obligation. Assuming therefore for the present argument, that the validity of that decree cannot now be controverted for any of the causes returned by the defendants, the obligation itself stands admitted, and there is nothing further for the commissioners to inquire of. The reason why the statute of *H.* 8. and other statutes were passed was because new powers were given from time to time to the King's commissioners, which they had not at common law; amongst others, that of making general statutes and ordinances from time to time, to operate prospectively: such also is the power given to them to inquire by the oaths of a jury by whose default the damage happened, and what persons have lands which might be hurt by the inundation, or benefited by the banks, &c. The 7th sect. of the stat. 23 *H.* 8. gives the commissioners power to make, and ordain *laws*, and *ordinances*, and *decrees*; which word "*decrees*" must be there construed synonimously with *laws* and *ordinances*; i. e. such *decrees* as are of a general nature, containing matter of public regulation, like the by-laws of a corporation. For the statute goes on to give them power to amend or repeal the *same laws and ordinances*; which never could be intended to include *decrees* made in particular causes, whether executed in whole or in part: and *Callis* (*a*) considers that a *decree* once given is final; unless indeed reversed for error; or, according to the more modern practice, by a commission of review. Then the 17th section provides "that such laws, acts, "*decrees*, and ordinances" (seeming to consider them all in the nature of *general* laws, &c.) "made by the commissioners," shall stand "good and effectual and be put

(*a*) *Call. on Sew.* 287. and vide *ib.* 216, 217.

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" in due execution *so long time as their* commission en- " dureth, and no longer: except *the said laws and ordi-* " *nances* be made and ingrossed in parchment, and cer- " tified under the seals of the said commissioners into the " Court of Chancery, and then the king's royal assent be " had to the same." The latter part of the clause shews that the laws, &c. intended to be put in parchment and to be sanctioned by the king, were such as being of a general nature required publicity, and could not be intended of particular *decrees*, which are there used synonimously with *ordinances*. By that act the commission was only to endure for three years; but it was extended to 10 years by the stat. 13 *Eliz. c.* 9. *s.* 1.: and that enacts, " that all such laws, ordinances, and *constitutions*," (omitting *decrees*) as shall be made by force of any such commission, " and written in parchment indented, and under " the seals of the commissioners, &c. shall, without any " certificate thereof to be made into Chancery, and with- " out the Royal assent, continue in full force, notwith- " standing any determination of any such commission by " supersedeas, until the same *laws*, *constitutions*, and *ordi-* " *nances* shall be altered, repealed, or made void by the " commissioners after to be assigned," &c. Some of these laws, &c. might affect strangers to the Level; and therefore such a power could only be given by act of parliament. The laws and customs of *Romney* Marsh are referred to by the stat. of *H.* 8. as a model; which laws and customs appear to be coeval with the common law; and probably those or similar customs prevailed in other Levels subject to the same danger. The mischief and inconvenience of extending these statutable provisions, as to the duration of general laws, &c. to particular decrees, would be exceedingly great; for the persons who advanced their money upon the faith, and under the order, of the decree

decree in queſtion, acted under a competent authority at the time, and might have been puniſhable for diſobedience: but if the decree be not final and binding on the Level, or if it be even optional in the new commiſſioners whether or not they will now enforce it; thoſe perſons may be left without protection for the acts they have done by virtue of the decree, and without remedy for their reimburſement. How can they be prepared to go before a new jury, and originate all theſe proceedings again after the lapſe of ſo many years, and with the probability of many of their witneſſes being dead? By the ſame rule it might be neceſſary to juſtify acts done under former commiſſions half a century ago. The aſcertainment of the right or obligation on the Level, and the amount of the ſum to be expended on the repair, are the eſſential parts of the decree; and theſe are executed. The latter part of it, directing the reimburſement by a rate on the Level, is merely a legal conſequence of the other.

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Dampier, contrà; after premiſing, that if there were any failure of juriſdiction the new commiſſioners would be expoſed to actions of treſpaſs by every perſon on whom the rate was attempted to be levied; contended in ſupport of the preliminary objection, that the decree of the 29th of *June* 1799 could not be enforced by them after more than a year from the expiration of the old commiſſion under which that decree was made. The words of the ſtatute of *Hen.* 8. are very preciſe; that "the laws, acts, *decrees*, and ordinances made by the "commiſſioners, &c. ſhall ſtand good, &c. and be put "in due execution *ſo long time as their commiſſion endureth,* "*and no longer.*" There is no reaſon for putting a dif-

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ferent interpretation upon the word *decrees*, as it there ſtands, than its ordinary ſenſe imports; and ſo it is conſidered by *Callis* (*a*): for, from the ſubject-matter of theſe decrees affecting the whole Level, they partake of the nature of general laws and ordinances. And though ſome inconveniences may enſue from limiting their effect to the duration of the commiſſion; yet there is an obvious advantage on the other hand in ſtimulating the commiſſioners to carry their decrees into ſpeedy execution, and finiſh their proceedings within the term of their commiſſion; in order that thoſe for whoſe immediate benefit the burthen is impoſed may be the perſons to bear it, and not leave it to be borne by others ſucceeding to them, who may be more remotely benefited by the works. But at any rate a method is provided of preventing the failure of juſtice in any particular caſe, by ingroſſing the decree in parchment, and certifying it into Chancery under the ſeals of the commiſſioners, and procuring the king's aſſent to it. The 1ſt ſect. of the ſtat. 13 *Eliz. c.* 9. only diſpenſes with the certificate and royal aſſent to ſuch laws, ordinances, and conſtitutions, *where the commiſſion is determined by ſuperſedeas*, until altered or repealed by the ſubſequent commiſſioners: and the 2d ſect. only provides that after the end of 10 years from the teſte of any commiſſion, all ſuch laws, ordinances, and conſtitutions as were made by virtue of it, and written *in parchment, indented, and ſealed*, as before mentioned, without certificate or the royal aſſent, ſhall continue in force for one year next enſuing the end of the 10 years: and during that year power is given to the juſtices of peace to execute the powers of the former commiſſioners, un-

(*a*) *Callis*, 284, 5, 6.

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less in the mean time a new commission issue: which was to enable the justices in cases of particular urgency to finish what might have been left undone for want of time under the expired commission. But as this case is not shewn to be within the latter statute, it must be governed by the general provision of that of *Hen.* 8. The authority of *Callis* (*a*) is express, that "all other laws and ordinances of sewers which are but made and writ in paper; or which be but in parchment, and not indented; or which be indented also, if not sealed; continue in force no longer than that commission continueth by the power whereof they were made." Besides, here was a discontinuance in point of time between the expiration of the justices' year and the issuing of the new commission. Then the mischief suggested of making persons trespassers by relation could not happen; for whatever was done under a valid decree, while the commission under which it was made continued in force and for one year afterwards, would be always justifiable; but nothing remaining afterwards to be done could be justified under a new commission: and here the most important part of all, namely, the levying the money by a rate on the Level remains still to be done.

Lord ELLENBOROUGH C. J. said that this was a point of great importance and novelty, and they would consider of it. The case accordingly stood over till this term, when his Lordship delivered the judgment of the Court.

This came before the Court on a return made by the commissioners of sewers to a writ of mandamus command-

(*a*) *Callis*, 286.

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ing them to make a rate on all persons holding messuages, lands, tenements, and hereditaments within the Level of *Huntspill*, which have or may have hurt or damage by inundation of the sea for want of a sufficient sea wall, or who may have benefit by preventing such inundation; for repaying to the Marquis of *Buckingham*, *John Tynte* Esq. *Henry Gould* Clerk, *Robert Jeffery*, and *Joseph Hanbury*, the sums of money respectively expended and paid by them to the collector, beyond their proportions of the expenditure in making a sea wall or bank. On the face of the return it appears, that a former commission of sewers issued under the great seal, dated the 13th of *April* 1795. That the commissioners acting under that commission, at a court of sewers held on the 29th of *June* 1799, did make and ordain a certain order and decree under their hands and seals, whereby they ordered, decreed, directed, and appointed, that a new sea wall should be built, and that all and every person and persons who had or held any messuages, lands, tenements, and hereditaments, within the Level of *Huntspill*, which had or might have any hurt, loss, or disadvantage by inundations of the sea there, for want of a sufficient wall there, or which had or might have any benefit by preventing such inundations, ought to be charged with the erecting and building such wall. And the commissioners, at the said court, did by their said decree further order, that the Marquis of *Buckingham*, and the other persons named in the order, should pay to the collector the sum of 3000*l*. 1*s*. 10*d*. which they adjudged to be the expence of erecting the said wall, in certain specified proportions; which sums were to be repaid to them out of the sums to be raised by virtue of a rate or assessment to be thereafter made. That, in

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pursuance of that order and decree, great part of the new sea wall had been built, and great part of the said sum of 3000*l.* 1*s.* 10*d.* has been laid out about the building it. That the former commission of sewers, under which the commissioners made the above order and decree, expired on the 13th of *April* 1805, according to the provisions of the statute. That a year after its expiration a new commission of sewers issued, dated 15th of *April* 1806, appointing the defendants commissioners; and that the order and decree, or that part of it which directed all persons who had messuages, lands, tenements, and hereditaments, within the Level, which might have loss by inundation, or benefit by the wall, to be charged with the erecting it, had not been carried into execution during the 10 years continuance of the commission, or during the year which elapsed between the expiration of that commission and the issuing of the present commission. Upon these facts, so appearing on the writ and return, the question is, Whether the commissioners under the present commission have authority to carry into execution or enforce the order and decree of the late commissioners, by making a rate on the several persons holding lands, &c. within the Level, as required by the writ of mandamus? And we think they have not. The stat. 23 *H.* 8. *c.* 5., directing the form of the commission of sewers, and the powers of the commissioners, provides by sect. 17. that such *laws*, *acts*, *decrees*, and *ordinances*, as shall happen to be made by the said commissioners, shall stand good and effectual, and be put in due execution, *so long time* as their commission endureth, *and no longer*; except the said laws and ordinances be made and engrossed in parchment, and certified under the seals of the said commissioners into the King's Court of Chancery,

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and then the king's royal aſſent be had to the ſame. The ſtat. 23 *H.* 8. *c.* 5. was made to endure for 20 years only. the ſtat. 3 & 4 *Ed.* 6. *c.* 8. makes the ſtat. of *Hen.* 8. perpetual; adding thereunto, that every commiſſion of ſewers therafter to be awarded ſhall continue for the term of 5 years next after the teſte of ſuch commiſſion, unleſs the ſame commiſſion ſhall otherwiſe be diſcharged within the ſame time by ſuperſedeas. Then came the ſtat. 13 *Eliz.* *c.* 9., which enacts that all commiſſions of ſewers ſhall ſtand and continue in force for 10 years next enſuing the date of every ſuch commiſſion, unleſs the ſame be repealed or determined by reaſon of any new commiſſion in that behalf made, or by ſuperſedeas. And all ſuch laws, ordinances, and conſtitutions, as ſhall be duly made by force of any ſuch commiſſion, according to the effect and tenor limited in any former ſtatute touching commiſſioners of ſewers, *and being written in parchment indented*, and under the ſeals of the ſaid commiſſioners, or ſix of them, ſhall without any certificate to be made into the Court of Chancery, and without the royal aſſent, ſtand and continue in full force and effect, notwithſtanding any determination by ſuperſedeas, until ſuch time as the ſame laws, conſtitutions, and ordinances ſhall be altered, repealed, or made void by the commiſſioners after to be appointed. Sect. 2. provides, that, after the end of 10 years from the teſte of a commiſſion of ſewers, all ſuch laws, ordinances, and conſtitutions, as were made by virtue of ſuch commiſſion, *and written in parchment indented, and ſealed*, as aforeſaid, without certificate thereof, or royal aſſent had, ſhall continue in force for one year, notwithſtanding the determination of the commiſſion by the expiration of 10 years; and the juſtices of peace ſhall during that year have power to

execute

execute the ſame. Provided, that if a new commiſſion iſſue, the power of the juſtices ſhall ceaſe. In the preſent caſe the commiſſion of ſewers, under which the commiſſioners acted who made the order or decree in queſtion, and which is attempted to be enforced by this writ of mandamus, continued in force for the ſpace of 10 years from the date of it; viz. from the 13th of *April* 1795 to the 13th of *April* 1805: and after its expiration a year intervened before the date of the new commiſſion, 15th *April* 1806. So that under the above ſtat. of the 13th of *Eliz.* all laws, ordinances, and conſtitutions, though written in parchment indented and ſealed, (which was not the caſe of the order in queſtion,) had ceaſed, and were no longer in force at the time of iſſuing the preſent commiſſion. Is then the order and decree of the 29th of *June* 1799, made and ordained by the late commiſſioners as ſtated in the writ and returns, an "*act, decree, law,* "*ordinance, or conſtitution,*" within the meaning of the ſeveral acts of parliament above referred to? The ſtatute of *Hen.* 8. uſing the terms *laws, acts, decrees,* and *ordinances;* and the ſtatute of *Eliz.* uſing the words *laws, ordinances,* and *conſtitutions.* On the part of the proſecutors of the writ it has been argued, that *decrees, laws,* and *ordinances,* mentioned in the ſtatutes, mean laws of *general regulation,* and not *orders* and *decrees,* ſuch as the one in queſtion, which is in the nature of a judgment. That to conſtrue it otherwiſe, and to hold that the order and decree is no longer binding after the expiration of the commiſſion, would be to ſubject all who have acted under ſuch order and decree to actions againſt them, in which they could not juſtify under ſuch expired order. But we do not find any authority cited for this diſtinction. The acts of parliament mean to expreſs the ſame things by the

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different words used: the *laws*, *acts*, *decrees*, and *ordinances* mentioned in the act of *H.* 8. must mean the same things as *laws*, *ordinances*, and *constitutions*, mentioned in the act of Queen *Elizabeth*; and nothing is to be found in the acts of parliament to restrain the generality of the expressions. And it does not seem as if any danger were to be apprehended, that those persons who had acted under the decrees of the commissioners, during the existence of the commission, or while the decrees continued in force, would be subjected to actions: for they would be in the situation of persons who had acted under the authority of a law while it was in force, which had since expired; but which was of force to protect them during the time they had acted, and required its protection. As to so much therefore of the decree as has been acted upon and carried into execution during the time of the late commissioners, it is effectual; and what has been done under it has been done under a competent authority: such part of it as has not been carried into execution cannot now be enforced on the foot of that order or decree, because it has ceased to have any authority; and application must therefore be made to the new commissioners to re-enact it. For these reasons we are of opinion that the return to the mandamus is good and must be allowed.

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By the construction of the stat. 39 & 40 *G.* 3. *c.* 47. the *London* Dock Company are liable, even during the first 12 years of their establishment, to be rated for the fair annual value of their *warehouses* and other works which are finished and productive, though all the works directed by the act be not completed. But such completed works must under such circumstances be rated for their value at the rate of 8½*d.* in the pound; such being the rate calculated upon by the Legislature to raise 139*l.* 8*s.* 7*d.* per quarter upon 3966*l.* the average rental for 10 years preceding the act of parliament on the premises destroyed by the company in making their works; and which quarterly sum the company were at all events bound to pay to the parish during the 12 years, or until the works were completed, whether those works were productive or not. But when productive beyond that sum, the surplus is to be taken in the first instance by the company in order to reimburse themselves what they may have advanced to the parish, to make good the deficiencies, before any such productive surplus existed, until the company shall be reimbursed.

Therefore until these purposes are effected, a rate made on the increased real value of the dock premises at more than 8½*d*. in the pound, or a rate of 8½*d.* in the pound on the old average value of the premises before the erection of the company's works, and below the increased value of the new works, is in either case bad.

A Rate was made and allowed on the 30th of *May* 1806 for the relief of the poor of the parish of *St. George*, in the county of *Middlesex*, in which the *London* Dock Company were assessed for warehouses and erections within the scite of the *London* Docks, and for the docks, in the sum of 975*l.*, being a rate of 1*s.* 3*d.* in the pound upon an annual value of 15,600*l.*; from which rate the *London* Dock Company appealed to the Sessions, who allowed the appeal, and amended the rate, by reducing the assessment on the company to 139*l.* 8*s.* 7*d.*, subject to the opinion of this Court on the following case

In pursuance of the stat. 39 & 40 *Geo.* 3. *c.* 47. a bason, a large dock, and an extensive quay, have been constructed, and several warehouses erected, within the limits mentioned in that act. On the 11th of *January* 1805 three of the Lords Commissioners of the Treasury certified, that the *several works* following, viz. the bason at *Bell* Dock, the dock communicating therewith, the tobacco warehouse, and certain other warehouses, vaults and quays particularly enumerated, all situated within the premises belonging to the company, were then *so far completed* as to be fit and proper in every respect for the reception

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reception of tobacco, rice, wine, brandy, geneva, and other ſpirits; which certificate was publiſhed in the *London Gazette*, and in two morning papers uſually circulated in *London*, on the following day. On the 29th of *May* 1805 a ſimilar certificate was made, and duly publiſhed on the following day, relative to the warehouſe No. 3., on the north ſide of the dock. On the 17th of *May* 1805 a ſimilar certificate was made, and duly publiſhed on the following day, relative to the warehouſes No. 2. and 5. on the north ſide of the dock, and the vaults underneath, &c., and the quay in front of the ſame. And on the 1ſt of *June* 1805 a ſimilar certificate was made, and publiſhed on the following day, relative to the warehouſe No. 4. on the north ſide of the dock, the vault underneath it, and the quay in front of the ſame. On the 31ſt of *January* 1805 the principal dock and outer baſon was opened for the reception of ſhipping; and from that time down to the making of the rate, ſhips were received in the dock and baſon, and their cargoes unloaded on the quays, and great part ſtowed in the warehouſes; and the rates preſcribed by the ſtatute for dockage, quayage, wharfage, &c. were paid there to the *London* Dock Company. In *January* 1806 a dividend, purſuant to the ſtatute, of two and a half per cent., and property tax thereon, was declared and paid. The capital upon which that dividend was paid exceeds 1,200,000*l.* On the 1ſt of *Sept.* 1804 a warehouſe for tobacco, being part of the ſaid warehouſes, was agreed to be let by the *London* Dock Company for 15,600*l.* per ann. groſs rent; the company paying all taxes: ſuch rent to commence from the 1ſt of *Feb.* 1805: and the company received the ſaid rent from the laſt-mentioned date until the making of the ſaid rate. The ſaid tobacco warehouſe, and the dock

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dock and quay, and the ſaid warehouſes Nos. 1, 2, 3, 4, and 5. on the north ſide of the dock, and the baſon, are all within the pariſh of *St. George*, and are of a higher annual value than the ſum at which the company are aſſeſſed for the ſame. The act of parliament empowers the company to purchaſe a very large extent of ground, compriſing about 96 acres; of which about 50 only are yet uſed, and it is intended to uſe the remainder. Various works are now in their progreſs, and carrying into execution with as much expedition as the nature of the caſe will allow. Of 19 warehouſes within the pariſh of *St. George*, begun before the date of the rate, ſix only (including the tobacco warehouſe) were then finiſhed, and in uſe. Another entrance to the dock at the Hermitage remains to be made; and the company are now treating with the proprietors of the land adjoining for the purchaſe of the ſame. From *Midſummer* 1801 until the making of the rate appealed againſt, the *London* Dock Company paid the pariſh of *St. George* 139*l.* 8*s.* 7*d.* quarterly; the ſame being calculated, purſuant to the directions of the ſtatute, on an average of the produce of the poor's rate for 10 years preceding on the premiſes deſtroyed by the company. It was afterwards added to the caſe, that the pariſh has not yet reimburſed the company any part of the ſums advanced by the company to the pariſh in reſpect of the deficiencies in the aſſeſſments for the poor rates. And the company has not paid either the rate in queſtion or any ſubſequent rate.

The caſe was argued in laſt *Trinity* term by *Beſt* Serjt., *Garrow*, *Holroyd*, *Pooley*, and *Boſanquet*, for the company; and by *The Attorney-General*, *Gurney*, and *Gleed*, for the pariſh. And now

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Lord ELLENBOROUGH C. J. delivered the opinion of the Court. This matter comes before the Court on a motion to quash an order of sessions, allowing an appeal of the *London* Dock Company against a rule made for the relief of the poor of the parish of *St. George, Middlesex*, by which the company were assessed for warehouses and erections within the scite of the *London* docks, and for the docks, in the sum of 975*l*.; being a rate of 1*s*. 3*d*. in the pound upon an annual value of 15,600*l*.; and reducing the rate on the company to 139*l*. 8*s*. 7*d*., subject to the opinion of this Court upon a case stating, among others, the following facts; to which it is sufficient to advert in giving the judgment of the Court. In pursuance of the stat. 39 & 40 *Geo*. 3. *c*. 47. a bason, a large dock, an expensive quay, and several warehouses, having been erected within the limits mentioned in the act, three of the Lords Commissioners of the Treasury on the 12th of *Jan*. 1805, and on the 24th of *May* in the same year, made certificates, that a bason, certain docks, quays, and warehouses, mentioned in those certificates, were so far completed as to be fit and proper for the reception of certain commodities therein mentioned; which certificates were published in the *London Gazette*. That, subsequent to these certificates, ships had been received into the docks, their cargoes unloaded on the quays, stowed in the warehouses, and the rates prescribed by the statute for the dockage, quayage, wharfage, &c. paid to the company. That various works are now in their progress, and carrying into execution with as much expedition as the nature of the case will allow. That of nineteen warehouses begun before the making the rate, six only were then finished and in use; and that another entrance dock at the Hermitage remains to be made. And that from

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Midsummer 1801, until the making the rate appealed against, the company have paid the parish 139*l*. 8*s*. 7*d*. quarterly; the same being calculated pursuant to the directions of the statute on the premises destroyed by the said company; being at the rate of 8½*d*. in the pound per quarter upon 3956*l*., the average rental calculated upon the ten years preceding the act of parliament; and the rate appealed against being at the rate of 15*d*. in the pound upon a rental of 15,600*l*. And it is further stated, by an addition to the case, that the parish has not yet reimbursed the company any part of the sums which have been advanced by them to the parish in respect of the deficiencies in the assessments for the poor's rates.

Upon this case two questions have been made, 1st, Whether, during the space of 12 years from the passing the stat. 39 & 40 *Geo.* 3., the company are exempted from paying a larger sum than the average produce of the poor's rate from *Lady-day* 1790 to *Lady-day* 1800, if all the works directed by the act be not compleated; though others of the works should be finished, and be productive. And, 2dly, Although the company during such period, and under such circumstances, may not be liable to pay a larger sum for the *docks* and *quays*; whether they be not liable to pay, on account of the *warehouses* they have built, a further sum beyond such average rate. And with respect to this last question, we think that the docks, quays, and warehouses stand on the same footing; for the 59th section of the act, which gives the company a power to receive rates and duties, gives them a duty for every article of merchandize, *which shall be landed within the dock premises*, not exceeding the rate or charge theretofore usually paid in the port of *London*, for landing, loading, *and housing* every such article, during the year 1798: from

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whence it may be fairly inferred, that the Legiſlature meant that there ſhould be buildings or warehouſes, in which goods might be *houſed* on their being landed; and that warehouſes for ſuch purpoſe were conſidered by the Legiſlature as a part of, and comprehended within, the deſcription of *the dock premiſes*. As to the firſt queſtion; that depends on the conſtruction of the 106th ſection; it is in ſubſtance as follows. That during the term of 12 years, or until the works directed by the act ſhould be compleated, the company ſhould be liable to the extent of the average ſum raiſed for the laſt 10 years preceding the paſſing the act, to make good the deficiency occaſioned by the alterations, or making the docks, *and other works and premiſes which ſhould belong thereto.* And that when, after the act ſhould be carried into execution, the produce of the ſeveral aſſeſſments for all and ſingular ſuch houſes, lands, and hereditaments, as ſhould be ſtanding upon, or be part of the lands purchaſed for making the ſaid docks and other works, ſhould at the ſame rate per pound, (that is, at the rate at which ſuch average ſum was calculated) raiſe a larger ſum than the aſſeſſments from *Lady-day* 1790 to *Lady-day* 1800, in reſpect to the houſes and lands to be purchaſed by the company, raiſed within that period; that then the ſurplus ſhould, in the firſt place, be applied from time to time to reimburſe the company what they ſhould have paid for or in reſpect of the deficiencies occaſioned by the alterations cauſed by making the docks and other works, until the company ſhould be wholly reimburſed and repaid all the monies they ſhould have paid on account of the deficiencies. From this ſtatement of the ſection it appears that its firſt object was to indemnify the ſeveral pariſhes, within which the dock works were carried on, from the deficiencies in the rates

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which ſhould be created by the alterations made by the company; which alterations it was foreſeen would render a great deal of property unproductive for a time, and not the ſubject of an aſſeſſment. And the means by which it provided for this object was the impoſing on the company an obligation to pay any deficiency to the extent of an average aſſeſſment for the preceding ten years. And had the act had nothing elſe in its contemplation than making, as was contended, a bargain by which the company ſhould be bound to pay, and the pariſh to receive, for 12 years, or until the works were finiſhed, a certain ſum, the clauſe would have ſtopped at the proviſo: inſtead of which it proceeds to provide for its ſecond object, by directing what ſhall be done with the ſurplus, when, after the act ſhould be carried into execution, a larger ſum ſhould be raiſed at the ſame rate per pound than the produce of the ſeveral aſſeſſments on the houſes and lands purchaſed by the company. This ſecond object was the reimburſing the company the ſums they ſhould have paid, on account of the deficiencies: and this reimburſement was to be effected by paying ſuch ſurplus to them. But as it is clear that there could be no ſurplus, unleſs the ſum raiſed at the ſame rate per pound could increaſe, it follows that the intention of the Legiſlature was, that the docks, quays, and other new works, made by the company, ſhould be aſſeſſed; and not that a ſum equal to the deficiencies, calculated on an average for the 10 years before the paſſing the act, ſhould be paid for the ſpace of 12 years, or until the works directed by the act ſhould be compleated. We therefore think the intent of the Legiſlature was, that as ſoon after the act ſhould have been carried into execution, and the docks became ſo productive as, at the ſame rate per pound as that by

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which the fum of 139*l.* 8*s.* 7*d.* per quarter was raifed, fay at 8½*d.* in the pound, to raife a larger fum; that the docks and other productive works fhould be affeffed at that rate, according to their rental or other rule obferved in making rates. But as it appears in this cafe, that the rate appealed againft was a rate of 1*s.* 3*d.* in the pound; whereas the rate by which the 139*l.* 8*s.* 7*d.* was raifed was at 8½*d.* in the pound; the affeffment appealed againft is bad, as having been made at a higher rate than the act directs. And on the other hand, as the Seffions have reduced the fum to what a rate of 8½*d.* in the pound would produce upon a rental of 3966*l.*, inftead of reducing it to what a rate 8½*d.* in the pound would produce on a rental of 15,600*l.* (which we affume to be the fair rental of the productive works,) their order is wrong, and muft be quafhed, and a new rate be made: for we think, that it is evident from the recital of the 1ft fection of the ftat. 43 *Geo.* 3. and the ftatement of the facts in this cafe, that the works directed by the ftat. 39 & 40 *Geo.* 3. have not yet been compleated; and till then, or the expiration of the 12 years mentioned in the ftatute, and (while there is any thing remaining to be paid to the company,) the operation of the 106th fection, on which the goodnefs of the rate depends, is to continue.

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O'CALLAGHAN and FAGAN, surviving Executors of WM. STOPFORD, *against* Sir JOHN INGILBY, Bart.

Thursday, Nov. 26th.

THE plaintiffs declared in debt on two bonds to the testator, one of them dated the 8th of *April* 1794, in the penal sum of 3600*l.*, conditional for payment to him of an annuity of 200*l.* during the life of the defendant; the other dated 7th of *June* 1794, in the penal sum of 1800*l.* The condition of the first bond, set forth on oyer, recited an indenture tripartite, of the same date as the bond, made between the defendant of the first part, *W. Morland* and *T. Hammersley*, bankers and partners, of the second part, and the testator *W. Stopford* of the third part; reciting that *Morland* and *Hammersley*, in pursuance of the trusts of that indenture, and with the defendant's privity, had contracted with *Stopford* for the sale of an

1. Where tenant for life conveyed estates to trustees for 99 years, if he should so long live, in trust to raise money by the grant of annuities for his life, and afterwards he and the trustees granted an annuity to one by deed, reciting the former conveyance to the trustees; it is not necessary by the annuity act 17 *Geo.* 3. *c.* 26. to inrol a memorial of the trust deed; it not being "a deed, instrument, or assurance *whereby any annuity is granted*," but only a deed of conveyance to those who afterwards granted the annuity, and constituting their title to the estate charged therewith.

2. Where the memorial of a bond, conditioned to secure an annuity, recited in the condition an indenture between the same parties, and part of the same assurance, which stated the annuity to be granted "for the price of 1800*l.*, which said sum of 1800*l.* *was paid by* "*the grantee to the grantors by his draft* on *R.* and Co. his bankers *at or before* the sealing and "delivery of the said indenture and bond;" and the memorial of the said indenture stated that the indenture witnessed that "in consideration of 1800*l.* to the grantors, *in hand paid* "by the grantee, and which was *paid to them by his draft* on *R.* and Co. his bankers, &c. *the* "*payment and receipt of which said 1800l. the grantors did thereby acknowledge*," the annuity was granted: this does sufficiently import, *that the consideration-money was actually received by the grantors*, through the medium of the draft, *before* the execution of the deeds granting the annuity; so as to dispense with the necessity of setting out in the memorial the particulars of such draft, with the time of payment.

3. The annuity act does not require that the estates charged with the annuity should be specifically set forth in the memorial: and therefore it is no objection that the memorial only stated the annuity to be charged on all the grantor's estates in the county of *York* and all other his premises conveyed to certain trustees.

4. It is no objection to the memorial of the deed granting the annuity, that it stated it, in general terms, to contain "powers of distress and entry, as stated in the deed;" for the annuity act does not require such powers to be stated, except so far as they create a trust, which brings them within the branch of the act relating to trustees. Nor,

5. Is the memorial required to state the covenants of the grantors for the due payment of the annuity.

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annuity of 200*l.* to him during the defendant's life, and to be secured in the manner therein mentioned, for 1800*l.*, which *Stopford* paid to *Moreland* and *Hammersley* by his draft on *Ransom* and Co. his bankers, at or before the sealing and delivering of the said indenture and of this bond, to be by them applied upon the trusts, mentioned in the same indenture; the defendant then pleaded, 1st, non est factum. 2dly, That *there was no memorial* of the bond inrolled in the Court of Chancery pursuant to the annuity act 17 *Geo.* 3. *c.* 26. 3dly, That by indenture of the 11th of *March* 1794, between the defendant, and *Morland* and *Hammersley*; after reciting that the defendant was seised of divers lands, &c. in the county of *York*, in the indenture particularly described, for his life; remainder to trustees to preserve contingent remainders, with divers remainders over; subject to certain incumbrances therein mentioned: and further reciting, that the defendant had granted to several persons named in a schedule thereunder written, during his life, the several annuities specified in the said schedule, amounting together to 1680*l.* per ann.; and that several of the annuitants had agreed to accept their purchase money and surrender their respective annuities, so that the same might be merged and extinguished; and that others had agreed to deliver up their then securities, and to accept of other securities in lieu thereof, upon *Morland* and *Hammersley* guarantying the payment during the defendant's life: so that all the annuities subsisting and to be granted should not exceed 2500*l.* per annum. And after further reciting, that the defendant had applied to *Morland* and *Hammersley* to assist him, and to enter into the necessary securities with him to guaranty the payment of such annuities; and in order to indemnify them from

Pleas.
1st, Non est factum.
2d, No memorial of the bond.
3d, Indenture of 11th March 1794, raising trusts in Morland and Hammersley.

That several prior annuitants had agreed to resell and surrender their annuities;

and others to release &c. and accept new securities.

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from all rifk and expence thereby, the defendant had agreed to grant and demife to them the feveral premifes therein-before mentioned, upon the trufts therein-after expreffed; which *Morland* and *Hammerfley* had agreed to: the indenture witneffed that the defendant, for the confiderations therein expreffed, conveyed and demifed to *Morland* and *Hammerfley*, and their executors, &c. the aforefaid lands, &c. for the term of 99 years, if the defendant fhould fo long live, upon the feveral trufts, &c., and fubject to the powers, &c. therein declared, &c. viz. upon truft that *M.* and *H.*, or the furvivor, &c. fhould raife money by granting annuities, fo as the fame fhould not be lefs than eight years purchafe, nor exceeding in the whole, with the former fubfifting annuities, 2500*l.* per ann., payable during the defendant's life, &c., and to be iffuing out of and charged upon the faid lands, &c. thereby granted and demifed, and to be fecured by the *ufual* and proper powers, remedies, and eftates; with powers of redemption. And it was thereby agreed that *M.* and *H.* fhould ftand poffeffed of and interefted in the faid demifed premifes, and of all fums raifed under the faid indenture in truft, (1ft,) to retain all their reafonable charges and expences: (2dly,) To re-purchafe and difcharge fo many of the faid fcheduled annuities, and to pay the feveral debts due from the defendant as aforefaid, in fuch manner as the defendant fhould think proper and expedient, and direct or appoint: and after fuch deductions and payments, upon truft; (3dly) to pay the furplus of the monies raifed to the defendant, or fuch perfons as he fhould direct, for his and their own ufe: (4thly,) Out of the rents, iffues, and profits of the faid lands, &c. to pay the feveral annuities, which during the continuance of the trufts fhould be charged upon the premifes: (5thly,)

Demife to Morland *and* Hammerfley *for* 99 *years if* Ingilby *fo long lived.*

upon truft to raife money by granting annuities.

Trufts of the monies to be raifed.
1. To retain expences of the trufts.
2. To re-purchafe fuch annuities and pay debts as Ingilby *fhould think proper or appoint.*
3. To pay the furplus to Ingilby.
4. Out of rents and profits to pay annuities to be granted.

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5. *If trustees should covenant to pay annuities, then to retain out of rents and profits 5l. per cent. on the amount so covenanted for.*

6. *To retain expences of collecting rents, &c. and conveyances, &c.*

7. *To pay the residue of rents and profits to Ingilby.*

(5thly,) upon trust that if *M.* and *H.* should enter into any covenant or agreement for the payment of any annuities so to be granted by them, &c., it should be lawful for them, so long as the said annuities should continue payable, to retain and deduct out of the said rents and profits 5*l.* per cent. upon the sum so covenanted to be paid by them: and (6thly,) from time to time to pay all expences incident and appertaining thereunto, and all charges and expences which they, *M.* and *H.*, should be put to in or about the collecting and receiving the rents and profits of the premises, or in preparing the necessary conveyances for securing payment of the annuities directed to be granted, or otherwise relating to the trusts thereby created: (7thly,) To pay the residue of the rents, issues, and annual profits of the premises to the defendant, for his own use. And it was thereby further declared, that all deeds and assurances to be executed by *M.* and *H.* or the survivor, &c. in pursuance of the said trusts, should to all intents and purposes whatsoever be as valid in law, although the defendant should not execute the same, as if he had joined therein, &c.; and that the receipts of *M.* and *H.* should be an effectual discharge to all persons paying them, &c. without being accountable for their misapplication. Which said indenture of the 11th of *March* 1794 was duly executed by the defendant, *Morland*, and *Hamersley*, in the presence of *W. S.* and *J. S.* The plea then stated, that after the passing of the stat. 17 *Geo.* 3. *c.* 26., and after the making of the last-mentioned indenture, the defendant on the 8th of *April* 1794 executed the bond in the first count mentioned with the condition as aforesaid; and that the defendant and *Morland* and *Hammersley* did also execute the said indenture tripartite mentioned in the said condition, and bearing the

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ſame date with the bond: by which laſt-mentioned indenture, after reciting as herein-before and in the ſaid indenture of the 11th of *March* 1794 is recited; and further reciting ſeveral other matters in that indenture contained; and alſo that *Morland* and *Hammerſley*, in purſuance of the truſts in the indenture of the 11th of *March* 1794, and with the privity and approbation of the defendant, teſtified by his being a party thereto, contracted with *W. Stopford*, (the teſtator) for the ſale of a clear annuity to him of 200*l.* during the term of 99 years, if the defendant ſhould ſo long live, and to be ſecured in manner aftermentioned, for the price of 1800*l.*; and after further reciting that for ſecuring payment of the ſaid annuity the defendant had given his bond for 3600*l.* in the firſt count mentioned, conditioned to be void upon payment of the ſaid annuity: the indenture witneſſed, that in performance of the ſaid agreement, and in conſideration of the ſaid 1800*l.* to *Morland* and *Hammerſley* at or before the ſealing and delivery of the ſaid indenture in hand well and truly paid by *Wm. Stopford*, to be by them *M.* and *H.* applied upon the truſts of the above recited indenture of demiſe; the payment and receipt of which ſaid 1800*l.* they, the defendant, *Morland* and *Hammerſley*, did by the ſaid indenture acknowledge, and from the ſame did acquit *Stopford*; and for the better ſecuring the payment of the ſaid annuity purſuant to the condition of the ſaid bond, and alſo in conſideration of 10*s.* to the defendant paid at or before the ſealing and delivery, &c., they the ſaid *Morland* and *Hammerſley*, in purſuance of the truſts of the above-recited indenture of demiſe, and with the conſent of the defendant, teſtified by his being party thereto, &c., and alſo he the defendant, and each of them, by his indenture did grant and confirm unto *Stopford*

Deed of 8th April 1794, *reciting as before in indenture of 11th* March, &c. *That truſtees, in purſuance of truſt, had agreed with* Stopford *for annuity of* 200*l.*

and that, for ſecuring it, Ingilby *had given his bond;*

witneſſed, that in conſideration of 1800*l. to be applied upon the truſts declared in indenture of demiſe.*

Grant of the annuity by truſtees and Ingilby,

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Stopford for 99 years, if the defendant ſhould ſo long live, an annuity of 200*l.* iſſuing out of and charged upon the aforeſaid lands, &c. deſcribed in and granted and demiſed by the above-recited indenture of demiſe unto *M.* and *H.* as aforeſaid, to be paid to *Stopford* quarterly at the banking-houſe of Meſſrs. *Ranſom*, *Morland*, and *Hammerſley*, in *Pall-Mall*, without any deduction or abatement whatſoever for or in reſpect of any taxes, charges, &c. or aſſeſſments whatſoever then or at any time thereafter to be impoſed, &c. on the ſeveral premiſes, &c. or on the ſaid *Stopford* in reſpect of the annuity, &c. The deed alſo contained covenants by *Morland* and *Hammerſley* for their own acts, and by the defendant for his own acts and theirs, and againſt the acts and deeds of all other perſons; and that if the annuity ſhould be in arrear for 21 days, it ſhould be lawful for *Stopford* to enter and diſtrain, &c., and that if the annuity ſhould be in arrear for 40 days, it ſhould be lawful for him to enter upon and hold the ſaid lands thereby charged, and take the rents and profits until all arrears, &c. ſhould be ſatisfied, without impeachment of waſte. And the defendant, *Morland*, and *Hammerſley*, jointly and ſeverally covenanted with *Stopford* to pay him, his executors, &c. the annuity of 200*l.* ſecured by the ſaid bond and indenture, clear of all deductions. The indenture alſo contained a clauſe of redemption on re-payment of 1800*l.* and the arrears. It alſo contained a covenant by the defendant, that he and *Morland* and *Hammerſley*, or ſome or one of them, had a right to grant the ſaid annuity of 200*l.*, and to charge the premiſes therewith: and alſo a covenant for further aſſurance: and alſo a joint and ſeveral covenant by the defendant, *M.* and *H.*, that no act had been done by them to prevent them from granting the annuity. The plea then

iſſuing out of the premiſes,

without deduction of taxes, &c.

Covenants.

Power of entry and diſtreſs if annuity in arrear for 21 days. If for 40 days, then to enter and receive rents and profits.

Covenant by truſtees to pay annuity.

Proviſo for repurchaſing.

Covenant that Ingilby *and truſtees had power to grant.*

No memorial of the indenture of

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then ſtated, that no memorial of the indenture of the 11th of *March* 1794, and of the truſts therein mentioned, was inrolled in the Court of Chancery, purſuant to the ſtatute. 4thly, The defendant pleaded alſo to the firſt count, that no memorial of the indenture tripartite of the 8th of *April* 1794, mentioned in the condition to the bond, was inrolled, &c.

11th March 1794.

4th plea, No memorial of indenture tripartite:

The plaintiff by his replication took iſſue on the plea of non eſt factum; and to the 2d and 4th pleas pleaded, that a memorial of the bond in the firſt count mentioned, and of the condition, and of the indenture tripartite of the ſame date mentioned in the condition of the bond, containing the day of the month and the year when the ſame was dated, and the names of all the parties thereto, and for whom any of them were truſtees, and of all the witneſſes thereto, and ſetting forth the annual ſum to be paid, and the name of the perſon for whoſe life the annuity was granted, and the conſideration of granting the ſame, was within 20 days of the execution of the bond and indenture tripartite, viz. on the 26th of *April* 1794, inrolled, &c. according to the form and effect of the act, &c.; which memorial is as follows; viz.—A memorial to be inrolled purſuant to an act, &c. of a bond dated the 8th of *April* 1794, under the hand and ſeal of Sir *John Ingilby* of, &c. whereby he became bound to *W. Stopford* of, &c. in the penal ſum of 3600*l.* with a condition, &c.; reciting, amongſt other things, an indenture tripartite bearing even date with the ſaid bond, and made between Sir *J. I.* of the firſt part, *Morland* and *Hammerſley*, bankers, of the ſecond part, and *W. Stopford* of the third part; and that *M.* and *H.*, in purſuance of the truſt repoſed in them by the ſaid indenture, had with the privity and approbation of Sir *J. I.* contracted and agreed with *Stopford* for

Replication to 2d and 4th pleas.

Memorial of bond ſet forth.

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for the fale to him of a clear annuity of 200*l.* to be paid, &c. during the term of 99 years, if Sir *J. I.* fhould fo long live, *and to be fecured in the manner therein mentioned* for the price of 1800*l.*; *which faid fum of* 1800*l. was paid* by *Stopford* to *M.* and *H. by his draft on Meffrs.* Ranfom *and Company, his bankers, at or before the fealing and delivery of the fame indenture and of the faid bond.* And the condition of the faid bond was, &c. (fetting it out as before expreffed) which faid bond was duly executed by Sir *J. I.* in the prefence of, &c. (fetting out the names, &c. of the witneffes.) The replication alfo fet out the memorial of an indenture of three parts, dated the 4th of *April* 1794, between Sir *J. I.* of the 1ft part, *Morland* and *Hammerfley* of *Pall Mall*, bankers, of the 2d part, and *W. Stopford* of the 3d part; *the faid* M. *and* H. *being truftees as well for the faid Sir J.* I. *as the faid* W. Stopford; whereby after reciting, amongft other things, that *M.* and *H.* in purfuance of the truft repofed in them by a certain indenture of demife, dated 11th of *March* then laft and therein recited, had with the privity and approbation of Sir *J. I.* teftified as therein mentioned, agreed with *W. Stopford* for the fale of a clear annuity of 200*l.* to be paid to *W. S.* his executors, &c. during the term of 99 years, if Sir *J. I.* fhould fo long live, and to be fecured in manner thereinafter mentioned for the price of 1800*l.*; and that for fecuring the faid annuity Sir *J. I.* by his bond of the fame date, with the indenture of which this writing purports to be a memorial, had become bound to *W. S.* in 3600*l.*, conditioned to be void on payment by Sir *J. I.* to *W. S.* during the term of 99 years if Sir *J. I.* fhould fo long live, an annuity of 200*l.* on the days, &c. mentioned; it was by the indenture now memorialized witneffed, that *in confideration of* 1800*l.* to *Morland* and

Memorial of indenture tripartite of 4th April 1794.

For whom M. *and* H. *truftees.*

Confideration-money, how paid.

Ham-

Hammersley in hand paid by W. S., *and which was paid to them by his draft on Messrs.* Ransom *and Co. his bankers*, to be *by them* M. *and* H. *paid and applied upon the trusts and for the intents and purposes* declared by the said indenture of demise of the 11th of *March* (the payment and receipt of which said 1800*l.* they, Sir *J. I. Morland* and *Hammersley* did thereby acknowledge) : and for better securing the payment of the said annuity *Morland* and *Hammersley*, in pursuance of the trusts reposed in them by the said indenture of demise, and with the consent of Sir *J. I.* and also Sir *J. I.* did, and each of them did grant and confirm to *W. S.* during the term of 99 years, if Sir *J. I.* should so long live, an annuity of 200*l.* to be issuing out of and charged upon all and every the manors, lands, &c. of Sir *J. I.* in the county of *York*, and all and singular other the premises of him Sir *J. I.* mentioned and described in and granted and demised by the said indenture of demise of the 11th of *March* last, to have and take the said annuity unto *W. S.* &c. during the term, &c. and to be paid to the said *W. S.* by four quarterly payments, &c. at the banking-house of Messrs. *Ransom*, *Morland*, and *Hammersley*, in *Pall Mall*, without any deduction or abatement whatsoever on account of taxes or otherwise howsoever: *with such powers and remedies by distress and entry* on the said premises for the recovery of the said annuity as therein are contained: and in which said indenture is contained a proviso that Sir *J. I.* shall be at liberty to re-purchase the said annuity on giving *W. S.* &c. three calendar months' notice, and on payment of 1800*l.* &c. : and this indenture was duly executed by Sir *J. I.*, *W. Morland*, and *T. Hammersley*, in the presence of *J. S.* of, &c. and *E. G.* &c. To the third plea the plaintiff demurred generally. And the

How to be applied.

Annuity granted jointly and severally.

Out of what premises.

Without deduction.

Proviso of redemption.

Demurrer to 3d plea.

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the defendant demurred to the plaintiff's replication to his 2d and 4th pleas: and there were similar pleas, replications, and demurrers to the second count on the other bond.

This case was argued at considerable length by *Holroyd* for the plaintiffs, and *Wetherell* contrà; and a great many objections were taken to the grant of this annuity, as well for the want of a memorial of the deed of the 11th of *March* 1794, conveying the defendant's estates to *Morland* and *Hammersley* in trust to raise money for him by way of annuity; and of the several trusts therein contained; as for the several defects of the memorials of the bonds and conditions of the deed of the 8th of *April* 1794, granting the annuity. The objections arising from the want of a memorial of the several trusts contained in the deed of the 11th of *March* 1794 became eventually unnecessary to be considered; and the other objections were distinctly stated and answered by the Court in giving the judgment; which was now delivered by

Lord ELLENBOROUGH C. J. This case comes before the Court on a demurrer pleaded by the plaintiffs to the defendant's third plea, and on demurrers pleaded by the defendant to the plaintiffs' replications to the defendant's second and fourth pleas. The plaintiffs declare in debt on a bond executed by the defendant to the plaintiffs' testator, *W. Stopford*, conditioned for payment of an annuity of 200*l.* per ann. during the life of the defendant, Sir *John Ingilby*. The condition of the bond recited an indenture tripartite, dated 8th of *April* 1794, between the defendant, Sir *J. Ingilby*, of the first part, *Morland* and *Hammersley*, bankers, of the second part, and the said

Stopford

Stopford of the third part; reciting that the bankers, in pursuance of the trusts reposed in them by that deed, had contracted with *Stapford* for the sale to him of one annuity of 200*l.* per annum during the life of Sir *J. Ingilby*, for 1800*l.*, which sum *W. Stopford* paid to *Morland* and *Hammersley* by his draft on *Ransom* and Co., his bankers, at or before the sealing and delivering of the said indenture and bond. The defendant then pleads, 1st, Non est factum. 2d, That there was not any memorial of the said bond inrolled pursuant to the statute. 3d, That by indenture of the 11th of *March* 1794 Sir *J. Ingilby* conveyed to *Morland* and *Hammersley* certain estates in *Yorkshire*, of which he, Sir *J. Ingilby*, was tenant for life; to hold to *Morland* and *Hammersley*, their executors, administrators, and assigns, for 99 years, if Sir *J. Ingilby* should so long live, upon trust to raise such sums of money as they should be able, by granting annuities for the life of Sir *J. Ingilby* not exceeding 2500*l.* per annum. That afterwards he, Sir *J. Ingilby*, executed the bond; and that he, and *Morland* and *Hammersley*, executed the deed of the 8th of *April* 1794 in the condition of the bond mentioned, being the deed granting the annuity to *Stopford*, (which is stated at length in the plea:) and then the defendant pleads that a memorial of the deed of the 11th of *March* 1794, (being the conveyance of Sir *J. Ingilby*'s estate to *Morland* and *Hammersley*,) and of the trusts therein mentioned to be reposed in *Morland* and *Hammersley* by that deed, was not inrolled pursuant to the statute. 4th, That no memorial was inrolled of the deed of the 8th of *April* 1794 mentioned in the condition of the bond, (being the deed granting the annuity to *Stopford*.) To these pleas the plaintiff replies; taking issue on the non est factum; and to the 2d plea he in his replica-

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tion sets out the memorial of the bond and condition. To the 3d plea the plaintiff demurs. To the 4th plea he sets out the memorial of the deed of the 8th of *April* 1794. The defendant by way of rejoinder demurs to the replications to the 2d and 4th pleas, which stated the memorials of the bond and condition, and of the deed of the 8th of *April* 1794, (the deed granting the annuity.) So that the questions are, 1st, Whether under the annuity act 17 *Geo.* 3. *c.* 26. a memorial ought to have been inrolled of the deed of the 11th of *March* 1794, by which Sir *J. Ingilby* conveyed his estates to *Morland* and *Hammersley*, in trust to raise money by grants of annuities: for if a memorial ought to have been inrolled of that deed, inasmuch as none has been inrolled, judgment ought to be for the defendant. 2dly, Whether the memorial of the bond and condition which has been inrolled, and which memorial is stated at length in the plaintiff's replication to the defendant's second plea, be or be not a sufficient memorial within the statute. 3dly, Whether the memorial of the deed of the 8th of *April* 1794 (being the deed granting the annuity) which has been inrolled, and which is stated at length in the plaintiff's replication to the defendant's 4th plea, be or be not a sufficient memorial of that deed within the statute.

A variety of objections have been taken on behalf of the defendant, Sir *J. Ingilby*, to the validity of this annuity. The ten first objections apply to the want of a memorial of the deed of the 11th of *March* 1794, being the deed by which Sir *J. Ingilby* conveyed his estates to *Morland* and *Hammersley*, particularizing the several parts of that deed, which the counsel for the defendant contends ought to have been stated in a memorial. But as the Court is of opinion that that deed is not within the true

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true intent and meaning of the annuity act, "a deed, "instrument, or assurance, *whereby an annuity is granted*," it is not necessary to enter into that set of objections more particularly. It is not a deed *whereby the annuity is granted*; but a deed conveying the estates to *Morland* and *Hammersley*, who *afterwards grant the annuity* to the plaintiff. It might never have been followed by the grant of any annuity at all, or not till after a long interval; and until some annuity shall be granted, it cannot be necessary to inrol a memorial of it: but before that time shall arrive the period may have expired within which by the terms of the annuity act a memorial of such deed is required to be inrolled; as was the case with respect to the present annuity. The act requires a memorial to be inrolled within 20 days of the execution of such deed; which shews that the Legislature had in contemplation such deeds only as formed the grant or assurance of the particular annuity, and not such as constituted the title of the grantor. On this ground therefore the plaintiff will be entitled to judgment on his demurrer to the defendant's third plea. The defendant has also taken several objections to the memorials inrolled of the bond and indenture of the 8th of *April* 1794, which is the deed granting the annuity to the plaintiff; which memorials are set forth in the replications to the second and fourth pleas; to which replications the defendant has demurred. These objections are, 1st, That the memorial of the deed of the 8th of *April* 1794 does not set forth the draft by which the consideration money was paid. 2. That it does not set forth the estates charged with the annuity. 3. That it does not set forth the exemption of the annuity from parliamentary and other taxes. 4. That it does not set forth sufficiently the powers of entry and distress.

 5. That

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5. That it does not ſet forth the covenants of Sir *John Ingilby*, and of *Morland* and *Hammerſley*, for the due payment of the annuity. Of theſe five objections the firſt had moſt weight with us; (viz.), That ſuppoſing it to appear upon the memorial that the conſideration was not paid in money, but by a draft; which draft had not been converted into money before the execution of the deeds; the particulars of the draft are not ſet forth. Becauſe it has been determined by ſeveral caſes, that where the conſideration was not paid in money, but by a draft, the particulars of that draft muſt be ſet forth: as in *Rumball* v. *Murray* (*a*), *Berry* v. *Bentley* (*b*), *Poole* v. *Cabanes* (*c*). And it is equally clear, that if paid by a draft converted into caſh before the execution of the deeds, the particulars of the draft need not be ſtated. It becomes material therefore to advert to the terms in which the payment of the conſideration is ſtated in the different inſtruments as they appear in the memorial ſtated on the record. The indenture *recited in the condition of the bond* ſtates the conſideration thus—" at or for the price or ſum of 1800*l.*; " which ſaid ſum of 1800*l.* *was paid* by the ſaid *Wm.* " *Stopford* to the ſaid *Wm. Morland* and *Thomas Ham-* " *merſley* by his draft on Meſſrs. *Ranſom* and Co., his " bankers, *at or before* the ſealing and delivery of the " ſaid indentures and bond." The annuity deed *as ſtated in the memorial of that deed* ſtates the conſideration thus— " in conſideration of the ſum of 1800*l.* of lawful money " of *Great Britain* to the ſaid *Wm. Morland* and *Thomas* " *Hammerſley in hand paid* by the ſaid *W. Stopford*, and " which was paid to them by his draft on Meſſrs. *Ran-* " *ſom* and Co., his bankers," to be by them the ſaid *W.*

(*a*) 3 *Term Rep.* 298. (*b*) 4 *Term Rep.* 690. (*c*) 8 *Term Rep.* 328.

Morland

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Morland and *T. Hammersley* paid and applied upon the trusts and for the intents and purposes declared by the abovementioned indenture. And the question is, whether these statements necessarily import that at the time of executing the deeds *the money* had not been paid to *Morland* and *Hammersley*, but only the *drafts*: and we think that they do not so necessarily import, that *only* the *draft* was *paid* to them; but that it may fairly be understood that the *money* was *paid*. The statements both aver payment of the money; viz. *which sum of* 1800*l. was paid at or before* the sealing and delivery of the deed and bond; and the statement adds the means by which the money was paid, viz. by a draft of the said *Wm. Stopford* on his bankers. It must be recollected that the part of the annuity act on which this objection is founded is the first section, which requires the memorial to set forth "the consideration or considerations of granting the annuity:" and the third clause, which requires that "in "every deed, whereby an annuity is granted, the consi- "deration really and bonâ fide shall be fully and truly "set forth:" and if the fact were that the *money* was not paid to or received by *Morland* and *Hammersley* before the deeds were executed, but only a *draft*, the defendant might have so pleaded the fact; which he has not done; and therefore the Court may well construe the words of the memorial as averring that the money had been paid by the means of a draft previously given; which construction the words seem fully to justify. The other four objections made to the memorial of the indenture of the 8th of *April* 1798 appeared at the time of the arguments not to be supported by the annuity act, or by the fact. The estates charged with the annuity are not by any clause of the act required to be stated; and in

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fact the memorial states the annuity to be charged on and issuing and payable out of all the estates of Sir *J. Ingilby* in the county of *York*, and all other the premises of Sir *J. Ingilby* granted to *Morland* and *Hammersley*. The objection that the memorial does not state that the annuity is exempted from parliamentary and other taxes is answered by the fact; the memorial stating the annuity to be paid without any deduction or abatement whatsoever on account of taxes or otherwise howsoever. The objection that the memorial does not sufficiently set forth the powers of entry and distress is answered by the fact of the memorial stating, "with powers of distress and entry, as stated in the deed;" and the annuity act does not require such powers of entry and distress to be stated, except so far as they create a trust which brings them within the branch of the act relative to trustees. And the last objection, that the covenants of Sir *J. Ingilby*, and of *Morland* and *Hammersley*, for the due payment of the annuity, are not stated in the memorial, fails; inasmuch as such covenants are not required to be stated; and it does appear that they are the grantors of the annuity. The consequence of this opinion which the Court has formed on the several objections made on the part of the defendant to these memorials is, that the plaintiff is also entitled to judgment on the demurrers pleaded by the defendant to the plaintiff's replications to the second and fourth pleas.

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FIELD *against* JONES, Marshal of the King's Bench Prison.

Thursday, Nov. 26th.

A day-rule, when made, covers, by relation back, the liberation of a prisoner who had signed the petition, but had gone out of the prison before the sitting of the Court on the same day; though the marshal were sued for the escape before the sitting of the Court.

THIS was an action for an escape against the marshal, and the proof was that the prisoner, *Serres*, who was in execution in the marshal's custody at the suit of the plaintiff was seen at large about 11 o'clock on the first day of *Michaelmas* term 1806. The defence was that *Serres* was out upon a day-rule granted by the Court on the same day; and by the stat. 8 & 9 *W.* 3. *c.* 27. *f.* 1. that could only have been granted at the sitting of the Court, which in fact did not sit till after the time when he was at large. And it further appeared that the plaintiff had actually filed his bill against the marshal in this action before the sitting of the Court on the same day. The petition of the prisoners in the marshal's custody and the day-rule were admitted at the trial, without formal proof; but were afterwards shewn to be in this form. The petition—" To the Rt. Hon. Lord Chief Justice " and the rest of the Judges of His Majesty's Court of " King's Bench, *Westminster*—The humble petition of " several prisoners in actual custody of the marshal of " this court, whose names are hereunto subscribed: " sheweth, that your said petitioners having this day " occasion to treat with their several creditors, advise " with their counsel, and follow their several suits at " law, in order to their discharge, humbly pray that they " may have leave *to go out of the prison this day* for the " purposes aforesaid, *and to return again the same day*. " And your petitioners shall ever pray," &c. (Signed by the several prisoners.) The day-rule runs thus—

 " *Thursday*

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FIELD *against* JONES.

" *Thursday* next after the morrow of *All Souls*, in the " 47 year of king *George* the 3d—*England*—Upon reading the petition of *J. T. Serres*, and others, prisoners " in the custody of the marshal of the Marshalsea of this " Court, this day presented to this Court; thereby praying that the said *J. T. Serres* might have leave to go " out of the said prison for the purposes in the said petition set forth; it is ordered that the said *J. T. Serres* " *have leave to go out of the said prison*, he returning " again into the custody of the said marshal on this day. " By the Court." On the part of the marshal, it was contended that the day-rule when granted was a justification to him for the liberation of the prisoner on the whole of the day, by relation back; and that there was no fraction of the day in this case; and that such had been the invariable practice in this respect, which had been recognized by Lord Ch. J. *Lee* upon a similar occasion. Lord *Ellenborough* C. J., before whom this cause was tried at the sittings at *Westminster* after the last term, was of this opinion: but it was agreed that the plaintiff should take a verdict with nominal damages; reserving leave to the defendant to move to enter a nonsuit if the opinion of the Court should be with him.

The Attorney-General (with whom were *Garrow* and *Topping*) accordingly obtained a rule nisi for this purpose at the beginning of the term; when he referred to Sir *Thomas Tipping*'s case, cited in an anonymous case in 1 *Stra.* 503. where it appears that a supersedeas was granted on the motion of a prisoner taken on an escape warrant, who, having signed the petition for a day rule in the morning, had gone out before the Court sat: and they held that being entitled to a rule, that rule would pro-

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tect him the whole day, and they could make no fraction of a day; though the Court in the principal case refused the supersedeas, because the prisoner had not signed the petition till after he was taken up.

Park and *Pell*, in shewing cause against the rule, relied on the stat. 8 & 9 *W.* 3. *c.* 27. *s.* 1. which directs that if the marshal, &c. or any other keeper of a prison, shall suffer any prisoner to go at large, except by virtue of some rule of Court, "which shall not be granted but "by motion made or petition read in open court," every such going out, &c. shall be deemed an escape: and argued that this provision was inconsistent with the practice which had prevailed. That the principal case in *Strange* seemed to overrule Sir *T. Tipping*'s case there cited; for otherwise, after the rule was once granted, which that case supposes it to have been, it would have related back to the beginning of the day, as well whether the prisoner had signed the petition before, as after, he went out: yet the Court there refused the supersedeas. They also referred to *Smallcomb* v. *Buckingham* (*a*) and *Combe* v. *Pitt* (*b*) to shew that the Court noticed the fraction of a day in cases of process.

Lord *Ellenborough* C. J. It would entirely frustrate the benefit of the day-rule to the parties, if the Court were to construe it thus narrowly and strictly: for if it were first to be moved, and then to be drawn up, and afterwards served upon the marshal, before the party could avail himself of it, he would have the benefit of a very small portion of the day, considering how late the Court usually commence their sitting on the first day of

(*a*) *Salk.* 320. (*b*) 3 *Burr.* 1434.

term,

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Field *against* Jones.

term. We will confider, however, that the rule was only granted, as legally it could only have been, when the Court fat on the firft day; but when granted, it was a liberty for that day, and covered the antecedent part of the day; becaufe, generally fpeaking, there is no fraction of a day, unlefs where it is neceffary to look to it in order to anfwer the purpofes of juftice. We need not, therefore, call in to our aid the cafe of Sir *Tho. Tipping*, cited in *Strange*, though it appear to warrant our opinion; becaufe that opinion is founded on the general rule of law. And as to the principal cafe cited in the book, it is no contradiction of the other; becaufe the day-rule is only to be granted by motion made or petition read in open court; and the rule when made would not extend to one who had not figned the petition at the time.

Per Curiam, Rule abfolute for entering a nonfuit.

Friday, Nov. 27th.

Brandon and Others *againft* Davis.

A prifoner under criminal procefs in the Houfe of Correction cannot be brought up by habeas corpus ad refpondendum, for the purpofe of being charged with a declaration on a bailable writ, and recommitted to his former cuftody fo charged.

SCARLET moved for a habeas corpus ad refpondendum, directed to *Aris* the keeper of the houfe of correction in *Cold Bath Fields*, (which prifon is under the direction of the juftices of the peace, and not of the fheriff,) to bring up the body of *Davis*, who was in that prifon under fentence for a mifdemeanor; the term of his imprifonment not being to expire till the 17th of next *January*: in order that he might be committed to the cuftody of the marfhal, and then charged with a declaration upon a bailable writ iffued againft him fubfequent to his imprifonment, at the fuit of *Brandon* and others, and an affidavit to hold him to bail for 2000*l.*; after

which

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which it was proposed that he should be remanded back to his former custody, charged with such action. He referred to *Keach*'s case (*a*), and to *Coppin* v. *Gunner* (*b*), in which latter case the Court gave leave to charge a felon in gaol with civil process. And in another case of *Lawrence and another* v. *Laidler* (*c*), one under sentence for a misdemeanor in *Newgate* was brought up in custody of the gaoler, and committed to the custody of the marshal,

(*a*) *Salk.* 351.

(*b*) 2 *Stra.* 873. 2 *Ld. Ray.* 1572. and vide the case of the bail of *Peter Vergen*, 2 *Stra.* 1217.

(*c*) This was read from a MS. Note Book of Practice furnished by Mr. *Short*, the Clerk of the Rules on the civil side. "*Lawrence and Another* v. *Laidler*, 13th *Nov.* 1758. The defendant being brought into court in custody of the keeper of his majesty's gaol of *Newgate*, by writ of habeas corpus; and the defendant being charged by the return to the said writ, that he, having pleaded not guilty to an indictment against him for a misdemeanor, was committed to the said gaol for want of sureties to prosecute his traverse at the next sessions of oyer and terminer for the county of *Middlesex*; and also on reading another writ of habeas corpus directed to the Judges of the Palace Court, &c., and the return thereto; whereby it appears that the defendant was taken on the 31st of *October* last within the jurisdiction of their court to answer to the plaintiff 15*l.*; and the defendant having put in bail in the said cause on the return of the said writ; and the said bail having this day surrendered the defendant in their discharge into the custody of the marshal; it is ordered that the defendant be recommitted into the custody of the keeper of the gaol of *Newgate* to answer to his said offence, *and to the said action*; to be by him kept in safe custody until he shall be from thence discharged by due course of law.

Lawrence and Another v. *Laidler.* } The defendant being this day rendered in court in discharge of his bail, it is ordered that he be committed into the custody of the marshal, &c. and that an exoneretur be entered upon the recognizance (1) of bail in this cause. 13th *Nov.* 1758."

There is another precedent in the same book, where the like was done in the case of a prisoner brought up in the custody of the keeper of the *Savoy*. *Bond* v. *Isaac*, E. 30 *Geo.* 2. 1757.

(1) If the action be by bill, the order is that an exoneretur be entered upon the bail-piece filed in this cause. *M.* 32 *Geo.* 2.

in

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in order to be ſurrendered by his bail; and was afterwards remanded to his former cuſtody charged with the action. [The Court ſaid, that that had only been done in caſes where the party was in cuſtody, on criminal proceſs, of the ſheriff or gaoler of the Court; but not as in this caſe where he was in the cuſtody of one who was not an officer of the Court.] The ſtatute placing houſes of correction under the cognizance of the juſtices of peace for the impriſonment of offenders could not mean to defeat civil juſtice by privileging ſuch offenders from being ſued till after the term of their impriſonment there expired. It is the acknowledged common practice to have priſoners brought up from ſuch places by writs of habeas corpus to be ſurrendered by their bail; and there is no reaſon why it ſhould not alſo be done in order to charge them with a declaration.

Lord ELLENBOROUGH C. J. The conſequence of charging this party with a declaration will be to make the gaoler of the houſe of correction liable to the plaintiffs in caſe of an eſcape. But the Maſter has mentioned a caſe to us, where the Court in Lord *Mansfield*'s time refuſed an application of this ſort to bring up a perſon in the cuſtody of the keeper of Bridewell; ſaying that this Court had no power to make a gaoler of ſuch priſons liable for the eſcape of a priſoner on civil proceſs. The only inconvenience from the law, as it ſtands, is that during a priſoner's confinement in theſe places he cannot be ſued, when probably a plaintiff could derive no fruit from his ſuit; and the plaintiff may prevent the ſtatute of limitations running upon his demand by ſuing out his writ and entering continuances.*

Per Curiam, Rule refuſed.

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PURCELL *against* MACNAMARA.

Friday, Nov. 27th.

In an action on the case for a malicious prosecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to have been before the action brought; and therefore a variance in that respect between the day laid and the day stated in the record, which was produced to prove the acquittal, is not material; the day not being laid in the declaration as part of the description of such record of acquittal.

IN an action on the case for a malicious prosecution, the declaration, after stating that on the 13th of *Jan.* in the 46 *Geo.* 3. at the *Middlesex* sessions of oyer and terminer, the defendant indicted the plaintiff for perjury alleged to be committed in an affidavit sworn, exhibited, and filed by the plaintiff on the 10th of *December* 46 *Geo.* 3. in a cause then depending in Chancery between these parties; the record of which indictment was set forth; and that the same was removed by certiorari into this Court; proceeded to allege that the defendant "prosecuted the said indictment against the plaintiff, "until afterwards, to wit, *on the morrow of the* Holy "Trinity *in the* 46*th year aforesaid*, at *Westminster*, &c. "in the Great Hall of Pleas there before Lord *Ellenborough* C. J. &c. the plaintiff was in due manner, &c. "acquitted of the premises charged upon her in and by "the said indictment," &c. At the trial before Lord *Ellenborough* C. J. at the sittings after last term at *Westminster*, the copy of the record of the indictment being given in evidence, it appeared by the postea, that the trial and acquittal took place "*on* Tuesday *next after the end of* "*the* [Easter] *term*," which was the day of nisi prius, before the Lord Chief Justice: whereupon the variance was objected to as fatal; and the case of *Pope* v. *Foster* (*a*) adduced as in point: and on the authority of that case the plaintiff was nonsuited.

But early in this term *Gurney* moved to set aside the nonsuit, on the ground that the particular day of acquittal

(*a*) 4 *Term Rep.* 590.

was

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was not material to be proved as laid, so that it was prior to the bringing of the action, which it appeared to be from the memorandum of the declaration on the nisi prius record compared with the record of acquittal. And that the declaration did not affect to set out the record of acquittal, according to its tenor; but the day was laid under a videlicet. And he cited a case of *The King* v. *Payne* (*a*) tried before Lord *Kenyon* C. J. at the sittings at *Westminster* after *Mich.* term 29 *Geo.* 3. where an indictment for perjury stated that "heretofore, to wit, *on* Monday *the* "3*d day of* December in the 28th year, &c. the cause "came on to be tried," &c. And it appeared by the nisi prius record, that the jury were respited until, &c. unless the justices, &c. should first come *on* Thursday *the* 29*th of* November, &c. Whereupon it was objected, that the proof varied from the indictment; as the cause must be taken to have been tried on the day mentioned in the nisi prius record. But Lord *Kenyon* overruled the objection; for the day, being stated under a videlicet, was not necessary to be proved exactly as laid. He also cited *Busby* v. *Watson* (*b*), where the declaration was for maliciously indicting the plaintiff at the General *Quarter* Sessions, &c.; and the proof being of an indictment at the *General Sessions*, &c. the variance was held immaterial. *Rex* v. *May* (*c*), where an indictment for perjury unnecessarily set out a prior indictment for an assault on which the supposed perjury was committed: but not being set out according to the *tenor*, but only *in manner and form*, videlicet, &c. the prosecutor was held not to be tied down to strict proof of an immaterial allegation in it, as laid. Also *King* v. *Pippet* (*d*), where a variance in stating a pre-

(*a*) This was read from a note taken by Mr. *Holroyd*.

(*b*) 2 *Blac. Rep.* 1050. (*c*) *Dougl.* 193. (*d*) 1 *Term Rep.* 235.

cept

cept to the sheriff; and *Frith* v. *Gray* (a), where the *county* in which a certain agreement was to be performed was mistated; were also held to be immaterial. And other cases cited in *King* v. *Pippet*, particularly *Rex* v. *Lookup*, where the objection taken and overruled was that an indictment for perjury upon a bill in Chancery stated the bill to be directed to *Robert* Lord *Henley*, &c.; whereas, it was directed to Sir *Robert Henley*, Knt. &c.; which was contended to be a much stronger case than the present.

The Attorney-General, *Garrow*, *Jekyll*, and *Abbott*, in shewing cause against the rule, relied principally on *Pope* v. *Foster* (b) as in point to the present objection; which, they observed, was subsequent to the case of *Rex* v. *Payne*; and therefore Lord *Kenyon*, who does not appear to have dissented from the rest of the Court in *Pope* v. *Foster*, must have changed his former opinion. And they also referred to *Green* v. *Rennett* (c), where in an action against an attorney for negligence in not prosecuting a debtor of the plaintiff to judgment; the return of the writ on which the debtor was arrested being laid to be in the 25*th year*, &c. and the writ itself appearing to have been returnable in the 24*th year*, &c.; the variance was held fatal; though the day of the return was laid in the declaration under a videlicet. And they contended that the acquittal, being a material fact, was necessary to be proved as laid, and could only be proved by the record: and that the rule, as to matters of proof by record, had always been held very strictly; for otherwise there might be two records.

(a) Cited in 4 *Term Rep.* 561. (b) 4 *Term Rep.* 590.
(c) 1 *Term Rep.* 656.

Topping

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PURCELL *against* MACNAMARA.

Topping and *Gurney*, in support of the rule, denied that the *day* of the acquittal was material, though the acquittal itself was: it was enough if it appeared to be before the action commenced: if it had only been alleged that *afterwards* (i. e. after the indictment) the party was acquitted, that would have been sufficient. In *Green* v. *Rennett*, the variance was material; becaufe otherwife the negligence of the attorney did not appear; and on that ground only the Court decided the cafe. The ftrictnefs of the rule, as to proof by matter of record, only applies where the *tenor* of the record is undertaken to be fet out: but here the fubftance only of it is alleged: and the very day cannot be material; becaufe the record itfelf does not ftate the fact truly in this refpect. They again relied on the cafes formerly cited.

Lord ELLENBOROUGH C. J. This nonfuit proceeded on the authority of *Pope* v. *Fofter*: if that cafe be law, the nonfuit ought to ftand; if it be not, both that cafe and this nonfuit muft fall together. There are two forts of allegations; the one of matter of fubftance, which muft be fubftantially proved; the other of defcription, which muft be literally proved. The queftion is, whether this be an allegation of the former fort. The allegation is, that the plaintiff was profecuted "until afterwards, to "wit, on the morrow of the *Holy Trinity*, in the 46th "year aforefaid, &c. fhe was in due manner acquitted." The fubftance of the allegation is no more than that the plaintiff was acquitted upon that profecution: and to fupport this action it muft alfo appear that fhe was acquitted *before* the action was brought. The day of acquittal is not alleged with a prout patet per recordum: the averment is, that the acquittal took place on *the morrow*

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of the Holy Trinity, when the record produced ſtates that it took place *on* Tueſday *next after* Eaſter *term:* and certainly there would be a repugnancy between the allegation and the proof, if it were to be conſidered as a ſpecific allegation of time: but if it be only taken as a ſubſtantial allegation of the fact of the acquittal, as of a time which is ſhewn to have been before the action brought; then the repugnancy is immaterial, and the proof in ſubſtance ſupports the allegation. And ſo it appears to me to do. If it had gone on to ſtate that the acquittal was on a certain day *as appears by the record;* that might have been conſidered as deſcriptive of the record, and then the variance would have been fatal. The ground therefore on which I conſider that the caſe of *Pope* v. *Foſter* ought not to bind us, as having been decided againſt principle, is, that this is an allegation of ſubſtance and not of deſcription. And this diſtinguiſhes it from *Green* v. *Rennett*, which was a caſe of deſcription: it deſcribed the writ in terms; when ſued out, and when returnable; and the return of the writ was part of the deſcription of the thing alleged, and could only be proved by the production of a writ ſo returnable. That caſe therefore was rightly decided: and ſo it appears to me was that of *The King* v. *Payne*; where a better opinion was delivered than in *Pope* v. *Foſter*, which paſſed without diſcuſſion.

GROSE J. I remember the caſe of *Pope* v. *Foſter*, which was not argued, but on the firſt ſtatement at the bar Lord *Kenyon* and my Brother *Buller* conceived that there was no ground for a new trial. It appears now that Lord *Kenyon* not long before had been of a different opinion in *The King* v. *Payne*; and upon principle I think that that caſe is the moſt fit and convenient to be adhered to.

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The good ſenſe and ſubſtance of the allegation is, that the acquittal took place at ſuch a time as to give the plaintiff her cauſe of action.

LAWRENCE J. I think that the caſe of *Pope* v. *Foſter* was wrongly decided. Where the day laid is made part of the deſcription of the inſtrument referred to, which inſtrument is neceſſary to be proved, the day laid muſt be proved as part of that inſtrument. But where the day laid is not material in itſelf, and need not have been proved as laid, ſuppoſing the proof to have been by parol; if the fact proved will ſupport the declaration, I ſee no ground for any diſtinction between making ſuch proof by matter of record or by parol. The caſe of *Pope* v. *Foſter* is certainly in point to the preſent objection; but it ſeems to have proceeded on ſome miſunderſtanding, as if there had been an attempt to introduce evidence of the real day of the trial and acquittal in order *to contradict the record*, which proved them to have been on a different day. But that was not the true ſtate of the caſe. The material fact which the plaintiff had to prove was his acquittal before his action commenced: in order to prove the acquittal, the record was produced: on reading which, the objection was made on the part of the defendant, that it ſtated the acquittal on a day different from that laid in the declaration. But if the acquittal appeared to have been on a day prior to the bringing of the action, that was all which it was neceſſary for the plaintiff to prove; and therefore there was no contradiction of the record. It was no more neceſſary to prove the preciſe day of the acquittal, as laid in the declaration, than it is, upon an indictment for murder, or in a declaration upon promiſes, to prove the preciſe day laid of committing the murder,

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murder, or of making the promise. The case of *Green* v. *Rennett* turned upon the materiality of the *return day* of the writ, as described in the declaration. On the production of the writ it appeared to have been sued out and returnable on different days from those laid in the declaration. It was first objected that the day of suing it out was material; but that was overruled at the trial by Mr. Justice *Buller*: but he said that the return day was material, and therefore nonsuited the plaintiff on the variance in that respect. Now the return day was material there, because it was part of the description of the writ stated in the declaration, which could only be proved by the production of a writ so returnable. Then the case of *The King* v. *Payne* is as much in point, in answer to the objection, as that of *Pope* v. *Foster* is in support of it. And the former was not mentioned when the latter was decided. And in *The King* v. *Lookup* the variance was much stronger than in this case: but yet it was thought sufficient that the complainant had preferred a bill before the person who held the great seal, whether he were styled Lord *Henley* or Sir *Robert Henley*. It is sufficient however to dispose of the objection in this case, that the day is not alleged as part of the description of the record of acquittal. The acquittal might have taken place on that or on any other day prior to the plaintiff's action; which it was proved to have been; and that was all which it was material for him to prove in respect to time.

LE BLANC J. We have been pressed with the case of *Pope* v. *Foster*; and if that had been solemnly discussed, and a rule of evidence there laid down which had been acted upon ever since, the Court might have found them-

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selves distressed by that authority, and it would have been difficult to have gotten rid of it. But it appears that a different rule of evidence had been before that time laid down by the same learned Lord who presided here when *Pope* v. *Foster* was determined; and no reference was then made to the former decision; but the latter case passed without discussion: and the question seems to have been brought before the Court embarrassed a little, as it seems, with the idea that evidence had been offered to contradict the record as to the day of the acquittal. But that was not so; for the only material part of the allegation in the declaration was, that the plaintiff was acquitted before the action brought; and it was immaterial on what day before: and the record was only produced to prove the acquittal. And I cannot see any reason why, where a fact is not material to be alleged on the exact day, and need not be proved exactly as laid, and the allegation of the day is not particularly descriptive of the record referred to; that it should become material, because it appears by matter of record instead of by parol evidence.

Rule absolute.

1807.

MANNING and Others *against* The Commiſſioners of Compenſation under the WEST INDIA Dock Act.

Saturday, Nov. 28th

THE ſtat. 39 *Geo.* 3. *c.* 69., eſtabliſhing the *Weſt India* Dock Company, and enabling them to make wet docks and build warehouſes and other works in the *Iſle of Dogs*, to which the *Weſt India* trade and ſhipping were to be removed from the quays, wharfs, and warehouſes higher up the river, which were before frequented by the trade; by *ſ.* 121. reciting that in conſequence of the works intended by the act, " ſome of the preſent legal quays, " &c. and certain warehouſes, docks, and divers other " tenements and hereditaments in or adjoining the port " of *London*, ſome of which warehouſes were known by " the name of *Up Town* warehouſes, and uſed for the " reception of *Weſt India* produce and other goods " landed, *might perhaps become leſs valuable*, by means of " the trade or buſineſs of the ſame reſpectively being in " part diverted, *than the ſame reſpectively are at preſent*; " and divers *owners and occupiers* of, and other perſons " intereſted in, &c. ſuch legal quays, &c. warehouſes, " docks, and other tenements, &c. *may thereby ſuſtain* " *loſs or damage*; and the *yearly and other receipts* of the " Governors of *Chriſt*'s Hoſpital in the city of *London*, for " on or account of the car-rooms, or figures for uſing " free carts within the ſaid city, &c. *may alſo thereby* " *happen to be leſſened*;" enacts, " that in caſe ſuch legal

The compenſation clauſe, *ſ.* 121. of the ſtat. 39 *Geo.* 3. *c.* 69. directing that in caſe any warehouſes, &c. (uſed for holding *Weſt India* produce before that act) ſhould be rendered *leſs valuable* by reaſon of the *W. I.* trade being diverted therefrom by the then intended *W. I.* docks and works, than they were *before the paſſing of the act*; or in caſe the *yearly or other receipts* of *Chriſt*'s Hoſpital ſhould be thereby leſſened; the owners of ſuch warehouſes, &c. and the Governors of the Hoſpital ſhould be compenſated; (thereby putting ſuch owners and governors on the ſame footing) muſt be conſtrued with reference to the *yearly* profits made of the premiſes *antecedent* to the paſſing of the act; and the *value* of ſuch warehouſes cannot be evidenced by the yearly profits made between the paſſing of the act and the opening of the docks, by which latter the loſs was occaſioned.

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MANNING and Others *against* The Commissioners of COMPENSATION, &c.

" quays, warehouses, &c. or any of them, shall by reason of the said intended works, &c. be rendered *less valuable* by reason or means of the trade thereof being diverted therefrom *than they respectively were before the passing of this act*; or any owners or occupiers of the same legal quays, *warehouses*, &c. shall by reason of any of the same works suffer loss or damage; or the *yearly* or other receipts or income of the Governors of *Christ's* Hospital aforesaid, for or on account of car-rooms, shall by reason of any of the same works happen to be lessened, the Commissioners of Compensations (appointed by the act) shall make such just and liberal compensation or satisfaction, &c. to the owners or occupiers, &c. of the same legal quays, warehouses, &c. *so rendered less valuable* respectively, and to the Governors of *Christ's* Hospital, &c. as shall be agreed upon between the said commissioners and such respective owners," &c. And by *s.* 122. If any person claiming compensation shall not agree with the commissioners as to the amount of it, and shall persist in their claim, the commissioners are to issue a precept to the the sheriffs of *London* or of the county, &c. where the premises lie; who are to return a jury at the time and place appointed; which jury is to award the amount of the compensation, and their verdict is to be final; and by *s.* 127. it is to be entered amongst the records of the General or Quarter Sessions, &c. The stat. 46 *Geo.* 3. *c.* 132. further regulates the trial of claims for compensation, which are to be before the justices at sessions. And by *s.* 9. reciting that questions of doubt and difficulty may arise as well concerning the title of claimants to compensation as the amount of the sum claimed, the justices are enabled " to reserve any point of law arising

 " upon

" upon ſuch trial for the conſideration of the Court of " *K. B.* upon motion to be made in the ſame court, in " the ſame manner as if ſuch point had been reſerved by " the Lord Chief Juſtice at niſi prius," &c.

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The plaintiffs were the owners of a warehouſe, which had been uſed by them for the purpoſe of receiving *Weſt India* produce before the paſſing of the act in queſtion, and for which a conſiderable rent was received; and this rent had progreſſively increaſed, owing principally to the increaſing importation of colonial produce into the port of *London*, and the conſequent increaſed demand for warehouſe-room, from a period of about four years before the paſſing of the act in 1799, till the opening of the docks in 1802, when their profits ceaſed, in conſequence of the removal of the trade to the company's docks and warehouſes. And the Commiſſioners of Compenſation having rejected their claim for compenſation for this loſs by reaſon of the dock works, it came on to be tried in the form directed by the act before the Recorder of *London*, and a jury, at the adjourned Quarter Seſſions for the city, holden at the *Guildhall*; when the claimants' title to ſome compenſation being eſtabliſhed in evidence, a queſtion of law aroſe reſpecting the time from which the average of the *value* of the premiſes, in reſpect of which compenſation was claimed, ſhould be calculated back; viz. whether in eſtimating ſuch *value* the jury were confined to take an average upon the *actual profits* made of ſuch premiſes for one or more years *prior* to the 12th of *July* 1799, when the *Weſt India* Dock act, 39 *Geo.* 3. *c.* 69. *paſſed*; or whether in eſtimating ſuch value, it were lawful for the jury to take into their conſideration the then *value* of the premiſes *evidenced by the actual profits* made *ſubſequent* to the paſſing of the act? The Recorder

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instructed the jury not to take into their consideration any evidence of the *profits* made of such premises *subsequent* to the passing of the act, but to confine their attention to the consideration of the *profits* made of them *prior* to that act. The jury calculated the compensation according to this direction, and assessed the plaintiffs' damages at *l.* Early in this term a rule nisi was obtained for setting aside the inquisition and having a new assessment of damages; upon an affidavit of the plaintiffs' claim and of the trial had, and that the question of law above stated had been reserved by the Court, as permitted by the act of parliament. And afterwards the Recorder made his report of the question of law reserved in the terms above-mentioned.

The case was argued by *The Attorney-General*, *Garrow*, *Dampier*, and *Ree*, against the rule for a new inquisition; and by *Best* Serjt. *Park*, *East*, and *Watson*, in support of it. And two days after

Lord ELLENBOROUGH C. J. delivered the opinion of the Court.

This was a motion for a new assessment of damages, upon the ground of a supposed misdirection of the Recorder of *London* in respect of the construction of the compensation clause in the *West India* Dock act, 39 *G.* 3. *c.* 69 *f.* 121, 122. (After stating *f.* 121.) Upon considering the terms of this clause, we think there is no reason to suppose that the Legislature meant to put the Governors of *Christ's* Hospital, therein mentioned, and any other owners of property and persons entitled to compensation under this section, for loss or damage sustained in respect of the other descriptions of property therein also

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alſo mentioned, upon a different footing. The Governors of *Chriſt*'s Hoſpital are under this ſection entitled to no compenſation, unleſs their *yearly receipts*, (which muſt be underſtood as their *yearly receipts before the paſſing of that act*) ſhould be diminiſhed. However they might increaſe between the time of paſſing the act, and however they might fall off afterwards; unleſs it ſhould have the effect of producing a diminution of the receipt, ſo as to reduce it below the ſum they *produced at the time of paſſing the act*; they could have no claim. From hence it appears to follow that, as the Governors of *Chriſt*'s Hoſpital could have no compenſation on account of the proſpective increaſe of their receipts or income, and their ſubſequent diminution; the owners of quays, wharfs, warehouſes, &c. put on the ſame footing with them, can alſo have no compenſation, on account of the proſpective increaſe of value in their property. And that the words of the act, "*leſs valuable*," muſt therefore be underſtood as meaning the ſame as the words "*leſs productive*." If the ſubſequent profits are allowed to be calculated upon, it will in effect be to adopt and proceed upon a calculation of the value *at the time of the claim*, inſtead of the value as taken before the paſſing of the act; which is the ſtandard of valuation expreſsly adopted and referred to by the act itſelf. Nor does the poſtponement of the period for making or admitting claims for compenſation, (under ſect. 128.) "until the expiration of three years after notice of the docks and dock premiſes being ready for uſe," appear to us at all to warrant, as has been argued, a contrary conſtruction of the act; the obvious purpoſe of this proviſion being only to allow a ſufficient interval for the accumulation of the fund out of which the compenſations allowed by the act ſhould be

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made. It appears to us, therefore, that the direction given to the jury by the Recorder has been correct in point of law, and that there is no ground for granting a new inquisition.

Rule discharged.

Friday, Nov. 20th.

JOSIAH PERRIN and MARIA PERRIN, Infants, by JOSEPH PERRIN, their Father and next Friend, *against* THOMAS LYON, W. D. EVANS, JOSEPH PERRIN, WM. GEDDES, and ARCHIBALD GEDDES.

AND

THO. LYON *against* WM. GEDDES, ARCHIBALD GEDDES, MARIA PERRIN, JOSIAH PERRIN, W. D. EVANS, and JOSEPH PERRIN.

J. P devised real and personal estate to trustees, to pay thereout an annuity to his wife for life, and out of the residue to pay sufficient for the maintenance, education, and support of his only daughter, *until she should attain the age of 21 years, or marry*; and when she should attain 21, or marry, then to her in fee: but in case his daughter should *die under age and unmarried*, then the estates to go to his wife for life; and, after her decease, *to the two children of his nephew*, as tenants in common in fee:— with a proviso, that if either his wife or daughter should *marry a Scotchman*, then his wife or daughter *so marrying* should *forfeit* all benefit under his will, and the estates given to such his wife or daughter as should so marry *should descend to such person or persons as would be entitled under his will in the same manner as if his wife or daughter were dead.* Held that such partial restraint of marriage was legal; and that the daughter having while under age married a *Scotchman* and died, leaving a son; such son could not inherit, nor her husband be tenant by the curtesy; but that the limitation over (the testator's wife being also dead) to the two children of the testator's nephew (which nephew was still living) took effect immediately on such marriage; they being the persons designated by the will to take in the event which had happened; the testator having considered such prohibited marriage the same as the death of his daughter under age unmarried.

ON the hearing of these causes before the Lord Chancellor, his Lordship directed a case to be stated for the opinion of this Court, in substance as follows:

Josiah Perrin, of *Warrington* in the county of *Lancaster*, being seised in fee of a considerable real estate, by

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his will dated the 22d of *Oct.* 1795, duly executed and attested to pass real estates; after directing his debts, &c. to be paid by his executors, and bequeathing to his wife the share in the glass-house concern which he had in her right, and also all his household goods, &c. devised as follows: " I give, devise, and bequeath unto my exe-" cutors hereinafter named, their heirs, executors, &c. " all and every my real and personal estates whatsoever " and wheresoever not hereinbefore disposed of, upon " trust in the first place to pay unto my wife one annui-" ty of 100*l.* during her life, &c. in full of all dower, " &c. And upon further trust to stand possessed of the " residue of the rents, issues, and profits of my said real " and personal estates, and put out the same to interest, " &c., and pay thereout to my niece *Mary Falkner* " 200*l.*, to be paid and applied for her use by my exe-" cutors in such manner as they shall think proper; and " to stand possessed of the residue of my effects, and pay " thereout for the maintenance, education, and support " of my daughter *Sarah Perrin* such sums of money as " shall be sufficient for that purpose; considering the " fortune she will be by this my will entitled to; *until* " *my said daughter shall attain the age of* 21 *years, or marry,* " which shall first happen. And *when* my said daughter " shall attain her said age of 21 years, or marry, *then* I " give, devise, and bequeath all and every my said real " and personal estates, charged with the said annuity to " my said wife as aforesaid, unto my said daughter, her " heirs, executors, &c.: *but in case my said daughter shall* " *depart this life under age, and unmarried,* then I give, " devise and bequeath all and every my real and personal " estates, charged as aforesaid, unto my wife, during the " term of her natural life; and after her decease, unto

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"the two children of my nephew *Joseph Perrin*, their "heirs, executors, and adminiſtrators, equally as tenants "in common, and not as joint-tenants. Provided al"ways, and it is my expreſs will and deſire, and I do "hereby ſolemnly order and declare, that *if either my* "*ſaid wife or daughter ſhall intermarry with any perſon* "*born in that part of* Great Britain *called* Scotland, *or* "*born of* Scotch *parents*, then and from thenceforth *my* "*ſaid wife or daughter, ſo marrying*, ſhall *forfeit* all benefit "and advantage under this my will; and my ſaid real and "perſonal eſtates, or ſuch part thereof as ſhall be given "to ſuch of my ſaid wife or daughter as ſhall ſo marry, "ſhall *deſcend to ſuch perſon or perſons as would be entitled* "*under this my will, in the ſame manner as if my ſaid wife* "*or daughter were dead*; any thing herein contained to "the contrary notwithſtanding." The teſtator appointed his wife and *Thomas Lyon* his executors, and guardians of his daughter during her minority; and died in *May* 1796; leaving *Sarah Perrin* his daughter and only child and heir at law, who was then 12 years old, and *Cath. Perrin* his widow, and *Joſiah Perrin* the younger, and *Maria Perrin*, the plaintiffs in the firſt-mentioned cauſe, the only children of his nephew *Joſeph Perrin;* who were living when the teſtatcr made his will. On the 13th of *July* 1802 *Sarah Perrin* (the daughter) being then under the age of 19 years, intermarried with the defendant *Wm. Geddes* of *Warrington*, merchant, who was born in *Scotland* and of *Scotch* parents. *Catherine Perrin* (the widow) died on the 5th of *February* 1803. *Sarah* (the daughter) died on the 5th of *July* 1803, and before ſhe attained the age of 21 years; leaving the defendant *Archibald Geddes* her only child and heir at law; who upon her death became the heir at law of the teſta-

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tor *Josiah Perrin*: but in case she had never been married, or had not had any issue, *Joseph Perrin* the defendant would be her heir at law, and on her death would have become the heir at law of the testator *Josiah Perrin*. The question was, Who, under the circumstances, was entitled to the real estates of the said *Josiah Perrin*?

Littledale, for the plaintiffs in the first cause, contended that the infant children of *Joseph Perrin* were entitled under the will to the real estate; it being given over to them in the event which had happened of the testator's daughter having married a *Scotchman*. First, as to the legality of the proviso in restraint of such a marriage: though by the civil and canon laws restraints of marriage are in general discouraged and held void; yet even those laws admit of exceptions to the general rule (*a*); as if the condition be only temporary, as not to marry before the age of twenty; or if it only exclude marriage with particular persons, as a widow, or a certain person by name; or in a particular place, as in *York*; or if one be made executrix with a certain benefit, so long as she remains unmarried. All the principles and cases applicable to pecuniary legacies in our law, as derived from the civil law, are fully illustrated in the case of *Harvey* v. *Aston* (*b*); and these and other partial exceptions are shewn to have been allowed; especially where there is a devise over in the event of the prohibited marriage. But restraints of marriage have always been admitted by the law of *England* in devises of real estate, and à fortiori where there is a devise over, as in this case. As in *Williams d. Porter* v. *Fry* (*c*), *Booth* v. *Booth* (*d*),

(*a*) *Swinb. part* 4. *sec.* 12. (*b*) *Com. Rep.* 726. 735. &c.
(*c*) 1 *Mod.* 86. 300. 1 *Chan. Cas.* 142. or 2 *Chan. Rep.* 26. 2 *Lev.* 21. *T. Ray.* 236. 1 *Ventr.* 199. (*d*) 2 *Chan. Cas.* 109.

Harvey

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Harvey v. *Aston* (*a*), *Reymish* v. *Martin* (*b*), *Scott* v. *Tyler* (*c*), and *Stackpole* v. *Beaumont* (*d*): all which cafes establifh the diftinction, that reftrictions of marriage upon pecuniary legacies are governed by the rule of the civil and canon law, which in general repels fuch reftrictions: but upon devifes of land, or even charges on land, they follow and are upheld by the law of *England*: It cannot be faid, as in fome former cafes, that the prohibition of marriage with a *Scotchman* was merely in terrorem; for that argument has never been admitted where there is an immediate devife over; though where the devifee over was not to take till a certain age, and the firft devifee married before the other arrived at that age, in the cafe of *Doe* v. *Freeman* (*e*), the firft devifee was held to take an abfolute eftate, notwithftanding her prohibited marriage, until the devifee over attained to the fpecified age. There are, however, many authorities in our books, which fupport a general prohibition of marriage to different perfons upon pain of forfeiting their eftate. As in 14 *Vin. Abr.* 16. tit. *Gavelkind*, (D), *pl.* 4. and *Co. Lit.* 30. *a.* note 1. If a wife feifed of gavelkind land die without iffue by her hufband, he fhall be tenant by the curtefy of half the land *fo long only as he fhall continue unmarried.* So a rent may be granted to determine upon marriage. *Co. Lit.* 180. *b.* So fellowfhips of colleges are avoided upon marriage; though fome of thefe, fuch as *Emanuel* and *Sydney* colleges, have been founded fince the Reformation; and this reftriction depends on the wills of the founders. *Co. Lit.* 234. *b.* commenting on the words *durante* and *dum*, fays, they are properly words

(*a*) 1 *Atk.* 361. *Caf. temp. Talb.* 212. *Com. Rep.* 726. *Willes*, 83.
(*b*) 3 *Atk.* 330. (*c*) 2 *Bro. Ch. Caf* 431. and 2 *Dickens's Rep.* 712.
(*d*) 3 *Vef. jun.* 89. (*e*) 1 *Term Rep.* 389.

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of limitation, as where an estate is granted durante viduitate or virginitate; or where a lease is made dum sola fuerit, or dum sola et casta vixerit. and so is 1 *Roll. Abr.* 418. *Condition* X, *pl.* 6. In *Robinson* v. *Comyns* (*a*), the devise was on condition that the devisee married the testator's grand-daughter; and no doubt was entertained of the validity of it; though Lord *Talbot* thought that the grand-daughter refusing to marry the devisee was a dispensation of the condition. In *Scott* v. *Tyler* (*b*) Lord *Thurlow* enumerates many restrictions which were even allowed by the civil law: the accuracy of which list, as far as it goes, was confirmed by Lord *Loughborough* in *Stackpole* v. *Beaumont* (*c*). Lord C. J. *Willes*, in *Harvey* v. *Aston* (*d*), even seems to consider that the law of *England* admits of a devise under a general restriction of marriage; and instances that a devise of an estate durante viduitate is certainly good. And in *Fry* v. *Porter* (*e*), and *Booth* v. *Booth* (*f*), a condition in restraint of marriage generally, without consent, with a limitation over, was clearly considered to be valid. But it is not necessary to contend that a devise on condition of a general restraint of marriage is good: it is enough that all the cases agree in support of a reasonable restriction of that kind; and there is nothing unreasonable in the restriction in question. There can be nothing unlawful in restraining the object of a testator's bounty from marrying with particular persons by name, or with the inhabitants of such a town, even in his own country; for bonds in restraint of trading or carrying on any business in a particular town or district have been held good (*g*). A re-

(*a*) *Cas. temp. Talb.* 164. 2 *Eq. Cas. Abr.* 215. 393.
(*b*) 2 *Dickens*, 721. (*c*) 3 *Ves. jun.* 97. (*d*) *Willes*, 94.
(*e*) 1 *Mod.* 300. (*f*) 2 *Chan. Cas.* 109.
(*g*) *Davis* v. *Mason*, 5 *Term Rep.* 118. and *Dunn* v. *Guy*, 4 *East*, 190.

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ſtraint then of marrying any foreigner of a particular country is at leaſt as reaſonable; or againſt marrying one of a different religion: and this will apply as well to *Scotland*, the eſtabliſhed religion of which is different from the church of *England*, and the country governed by a different law, though united under the ſame crown. Secondly, the condition in queſtion is good on another ground; for the deviſe to the daughter was when ſhe ſhould *attain* 21 *or marry*: therefore as ſoon as ſhe had attained 21, the eſtate would have become abſolute in her in fee, and not liable to be deveſted by any marriage ſhe might ſubſequently have contracted: the reſtraint of marriage therefore with a *Scotchman* only operated upon her till 21; and all the authorities agree that ſuch a reſtraint is good. That the eſtate would have veſted in her abſolutely at 21, if ſhe had not married before, appears from *Deſbody* v. *Boyville* (*a*), where a legacy was to be paid to a daughter when ſhe ſhould attain 21 or be married with the conſent of *A.* and *B.*; but in caſe ſhe married without ſuch conſent, the executors were only to pay her the dividends during her life; and after her death to transfer the ſtock to her children, &c.: and it was held that the condition determined at 21: and the ſame point was ruled in *King* v. *Withers* (*b*), and *Pullen* v. *Ready* (*c*). Thirdly, in the event of the prohibited marriage the eſtate is directed to "*deſcend* to ſuch perſon or perſons as would be entitled *under his will* in the ſame manner as if his daughter were *dead*." Now in caſe of the deceaſe of his daughter "*under age and unmarried*," (by which latter muſt neceſſarily be underſtood *unmarried to any perſon not prohibited by him*) the teſtator had before expreſsly de-

(*a*) 2 *Pr. Wms.* 547. (*b*) 1 *Eq. Caſ. Abr.* 112. *Prec. in Chan.* 348.
(*c*) 2 *Atk.* 587.

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vised the estate over to the two children of his nephew *Joseph Perrin*, as tenants in common, in fee. He evidently considered his daughter's marriage with a *Scotchman* as equivalent to her death unmarried: otherwise that which was to give effect to the limitation over would be made to defeat it: it would be felo de se. In case of the natural death of the daughter without issue, it would descend at common law to *Joseph* the father of the infants; but the testator has expressed what descent he meant, namely, that pointed out *under his will*, which is to his infant great nephews.

Park, on behalf of *Joseph Perrin*, (who would have been the testator's heir, if his daughter had died without issue,) argued that he would take if the limitation over were good; which he also contended that it was; and referred to *Pulling* v. *Reddy* (a), where the rule is laid down that if a legacy be devised on condition of marriage with consent, and there be no devise over in case the party marry without consent; this is only considered in terrorem: but if there be a devise over, it shall go to such devisee. But if the portion arise out of land, where there is no devise over, it shall go to the heir. Now the words of this will are that in case the daughter shall so marry, (*i. e.* a *Scotchman*,) the real and personal estate "shall *descend* to such person or persons as would be entitled under this my will, in the same manner as if my daughter were dead." But it was only given over before to the infant children of *Joseph Perrin* in case the daughter should die *under age and unmarried*;" both those events must concur; and in order to satisfy those words Mr. *Littledale* is obliged to add (unmarried) "within the meaning of my will," *i. e.* "to any other than a

(a) 1 *Wils.* 21.

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Scotchman:" whereas conſtruing the words uſed in their plain and grammatical ſenſe, without addition or ſubtraction, the perſon to whom the eſtate would *deſcend* if the daughter had died *under age and unmarried* would be *Joſeph Perrin*, who would then have ſtood in the place of heir at law to the teſtator and to his daughter. And by this conſtruction an effect is given to every word; for the eſtate would deſcend to *Joſeph Perrin under the will*, and, in no other way, ſince the prior claims of the teſtator's daughter and her children are by that alone put out of the way of his claim *by deſcent*.

Holroyd, for the defendants, contended that *William Geddes*, the father, was entitled as tenant by the curteſy for his life, with remainder in fee to his ſon *Archibald*: or, if not, that the whole fee veſted preſently in the ſon. Firſt, the teſtator's daughter took a veſted eſtate in fee, and it did not remain contingent until her marriage or age of 21: nor was there any condition precedent, to prevent the fee veſting in her until the condition was ſatisfied. It is a deviſe to truſtees of real and perſonal eſtate, in the firſt place, to pay an annuity to his wife; next, to pay for the maintenance and education of his daughter until her age of 21 or marriage; and *when* ſhe attained 21 or married, then to her in fee: but if ſhe died under age *and unmarried*, then he gave it over. A deviſe to one *if* or *when* he attains ſuch an age veſts immediately, though the eſtate be deviſed over if he die before. But here there is alſo a deviſe of maintenance to the daughter out of the eſtate until her age of 21 or marriage; the truſtees therefore merely took the management of the eſtate in the mean time as guardians. *Stoker* v. *Edwards* (*a*), *Edwards* v. *Hammond* (*b*), *Man-*

(*a*) 2 *Show.* 391. (*b*) 3 *Lev.* 132.

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field v. *Dugard* (*a*), *Goodtitle* v. *Whitby* (*b*), *Denn* v. *Satterthwaite* (*c*), *Doe* v. *Underdown* (*d*), and *Bromfield* v. *Crowder* (*e*), all ſhew that the fee veſted in the daughter in the firſt inſtance, liable only to be deveſted if ſhe died before 21 and unmarried, or on the happening of any other *legal* condition which the teſtator might afterwards impoſe: which is very different from the caſe where the eſtate is only given to the deviſee upon the happening of a particular event; as if the daughter married *A. B.*: there the marriage, or other event, on which the eſtate is ſo given, is a condition precedent, which, however illegal in itſelf, muſt take place before the eſtate can veſt in the party. This diſtinction will explain what was ſaid by Lord *Thurlow* in *Scott* v. *Tyler* (*f*), as to the difficulty of reconciling all the caſes. As where an eſtate is given to a widow durante viduitate; if ſhe marry again, the Court cannot give her the eſtate any longer, becauſe the condition of her widowhood is the only tenure by which ſhe holds the eſtate. The ſame diſtinction will apply to the caſes, cited, of gavelkind, and of fellows of colleges. Admitting, therefore, the diſtinction which has been taken between the civil and canon law, and the law of *England*; that the former avoids in general all reſtraints of marriage; and that the law of *England* has adopted that rule only with reſpect to pecuniary legacies, but not as to real property; (though it is obſervable here that the deviſe of the perſonal is joined with that of the real eſtate,) ſtill if the eſtate once veſted, as the authorities

(*a*) 1 *Eq. Caſ. Abr.* 195.
(*b*) 1 *Burr.* 228.
(*c*) 1 *Blac. Rep.* 519.
(*d*) *Willes*, 293.
(*e*) 1 *New Rep.* 313.
(*f*) 2 *Bro. Ch. Caſ.* 488.

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ſhew, in the daughter, the Court will not ſuffer it to be deveſted upon an illegal condition: and Lord C. J. *Wilmot*, in *Low* v. *Peers* (*a*), takes the ſame diſtinction, while he condemns generally all reſtraints of marriage as contrary to the policy of the law: and he ſhews that the caſe in the Year-book 43 *Ed.* 3. 6. *a.* from whence the dictum in 1 *Rol. Abr.* 418. is taken, is againſt the legality of the reſtraint; and refers to the opinion of Lord *Hale* in *Fry* v. *Porter* (*b*) for the reaſon given by him for ſupporting conditional limitations, (founded on prohibitions of marriage without conſent,) "becauſe the party is not thereby bound from marriage." The queſtion then is whether the reſtraint in queſtion, which applies both to the wife and daughter, be void, as being too general? This is not at all affected by that claſs of caſes legalizing covenants in reſtraint of trade in particular diſtricts; for they are founded upon adequate conſideration commenſurate with the reſtraint; namely, the proportionate benefit of the covenantee in the ſame trade or calling: and it is indifferent to the public whether *A.* or *B.* exerciſe their buſineſs in any particular place. But this is a reſtraint extending to a whole nation, and that too forming an integral part of the kingdom. If the reſtraint went to every perſon in *England*, it would clearly be void upon general principles of policy, as laid down by Lord C. J. *Wilmot* in *Low* v. *Peers*. Then why ſhould not the ſame principles extend to *Scotland?* The fact of the teſtator's having reſided in *England* cannot affect the queſtion of policy. Suppoſe that the daughter had married a perſon whom ſhe had reaſonable ground to believe

(*a*) *Wilmot*, 369, 370, 4. (*b*) 1 *Mod.* 308.

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was born of *English* parents in *England*; yet if in fact he were a *Scotchman*, though unknown to her, the forfeiture would still be incurred however innocently: which shews the unreasonableness of so general a restraint. The restraints which have been supported in particular cases, such as having the consent of parents or guardians, &c. were considered more as regulations to prevent improvident marriages: but this goes to restrain marriage whether provident or improvident; which is unreasonable, and on that account injurious to the interest of the public, which is concerned to promote provident marriages, or at least not to prohibit them. The case of restraining marriage with a person of a different religion is distinguishable, not as a restraint, but as a regulation of marriage: the difficulty of determining in what faith the children are to be brought up, and the domestic disputes consequent thereupon, may class this under the latter head. There may also be a distinction on the ground of public policy between prohibitions of marriage with a foreign nation, and with a nation forming part of the kingdom. On these grounds this condition would be void; and *William Geddes* would be entitled as tenant by the curtesy. But if not, secondly, the estate is not given over to *Joseph Perrin* as heir at law, (supposing the testator's daughter had in fact died unmarried) nor to his children; for it is only given over in the event of the daughter's marrying a *Scotchman*, &c. and then it is to "*descend* to such person or persons as would be entitled under my will in "the same manner as if my wife or daughter were *dead*; "any thing herein contained to the contrary notwith- "standing." The daughter therefore having left a child, it must descend to that child. This being the case of a

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forfeiture, the condition muſt be taken ſtrictly. In a MS. common place book of Judge *Dodderidge* (*a*) it is ſaid, " conditions that go in defeazance ſhall be taken ſtrictly, for they are odious." It is alſo to be taken ſtrictly as being in reſtraint of marriage, according to the opinion of Lord *Mansfield* in *Long* v. *Dennis* (*b*). The conſtruction contended for will alſo diſinherit the heir at law, which can only be by expreſs words or neceſſary implication. The eſtate is directed *to deſcend* as if the daughter were dead: this can only be to her ſon, who is her heir; and it cannot *deſcend* to any perſon except as heir of the perſon laſt ſeiſed; and no heir can take by deſcent in the life of his anceſtor. [Lord *Ellenborough* C. J. The word *deſcend* cannot be taken here in its ſtrict ſenſe, becauſe it is applied to perſonalty as well as realty. The teſtator only meant that the eſtate ſhould go over to the hæres factus in the event which he provided for.] Then being limited over as if the *wife* or *daughter* were dead; as applied to the daughter, it would go to her ſon. But the words " entitled *under this my will*" are relied on as referring to the limitation antecedently expreſſed: but that was only to take place in caſe his daughter ſhould die *under age and unmarried*. Now the condition of dying *under age* could not apply to the wife, who was above age when the will was made; as to her therefore it could only operate as a condition *in terrorem*: then why ſhould not the other condition of dying *unmarried* operate in terrorem alſo as to the daughter. Taken in the ſtrict ſenſe of the words, the event has not happened on which

(*a*) Cited in *Scott* v. *Tyler*, 2 *Bro. Chan. Caſ.* 456

(*b*) 4 *Burr.* 2055.

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the eftate was to go over; for the daughter did not die "under age *and unmarried*."

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Littledale in reply contended that the eftate never vefted in the daughter, but was in the truftees, who were to pay the widow's annuity out of it; to raife 200*l*. for the niece; and to provide for the education and maintenance of the daughter till fhe attained 21 or married; and the fums neceffary for the latter purpofes were to be eftimated by the truftees confidering the fortune fhe *would be* entitled to: therefore till 21 or marriage the teftator did not confider his daughter as entitled to any thing. But if the eftate did veft in her in the firft inftance, it was liable to deveft if fhe died *under age and unmarried*; and then as the prohibited marriage with a *Scotchman* operated by the neceffary conftruction of the will as a death, by the exprefs direction of the teftator; it follows that the eftate was devefted out of her, as upon her dying under age and unmarried, in which event the limitation over to the children of *Jofeph Perrin* was to take effect. And then the only queftion is upon the legality of the condition; which is not like cafes of contracts between parties ftipulating againft the marriage of one of them, fuch as *Low* v. *Peers*; but turns on the power which every man has to annex what condition he pleafes to his bounty. And this is as much a regulation of marriage as any of the cafes, admitted to be law, where devifes on condition of marrying with confent have been held binding.

Lord ELLENBOROUGH C. J. faid, that the Court would certify their opinion; but he faw no ground for holding this condition to be void, as being in general reftraint of

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marriage. And afterwards the following certificate was sent:

"Having heard this case argued by counsel, and considered it, we are of opinion, that under the circumstances of the above case *Josiah Perrin* and *Maria Perrin*, the two children of the testator's nephew *Joseph Perrin*, are entitled to the real estates of the said testator *Josiah Perrin*.

23d *January* 1808.

Ellenborough.
N. Grose.
S. Lawrence.
S. Le Blanc."

END OF MICHAELMAS TERM.

CASES

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ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Forty-eighth Year of the Reign of GEORGE III.

KINGSMILL, Bart. and Another *againſt* BULL and Another.

Monday, Jan. 25th.

Where a plea of juſtification in treſpaſs for taking two horſes as heriots, ſtated a cuſtom in the manor that the lord *from time immemorial, until the diviſion* of a certain tenement into moieties, had taken and been accuſtomed to take a heriot upon the death of every tenant dying ſeized; and *ſince the diviſion* the lord had taken and been *accuſtomed* to take on the death of every tenant dying ſeized of either of the moieties a heriot for each moiety: this muſt be taken to be one entire cuſtom, and not two diſtinct cuſtoms, the one applicable to the tenement *before*, and the other *after* the diviſion of it: and being laid to be an *immemorial* cuſtom, it is diſproved by evidence that the diviſion was made within memory.

IN treſpaſs for taking the plaintiffs' horſes, the defendants pleaded ſeveral juſtifications of the taking, as ſervants to the Earl of *Caernarvon*, lord of the manor of *Eccbinſwell* in the county of *Southampton*, for heriots due on the death of Sir *Robert Kingsmill*, Bart. the plaintiffs' teſtator, in reſpect of certain cuſtomary tenements of the manor, of which he died ſeized. And as to the ſeizing

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of two of the horſes, they alleged by their 21ſt plea, that at the death of Sir *R. K.* the laſt tenant, the Earl of *Caernarvon* was and ſtill is lord of the manor of *E.*; that one meſſuage, &c. *from time immemorial until the diviſion thereof into moieties*, was parcel of the manor, and a cuſtomary tenement thereof demiſed and demiſable by copy, &c. according to the cuſtom of the ſaid manor; and that continually from the diviſion thereof into moieties each of the ſaid moieties hath been and ſtill is parcel of the ſaid manor, and demiſed and demiſeable by copy, &c. The plea then ſtated the following cuſtom, upon the manner of ſtating which the queſtion aroſe. "That within the ſaid manor there now is, and from time whereof, &c. hath been an ancient cuſtom there uſed and approved, viz. that the lord of the ſaid manor for the time being, *from time whereof the memory of man is not to the contrary until the ſaid diviſion of the laſtmentioned cuſtomary tenement into moieties*, hath ſeized and taken, and been uſed and accuſtomed to ſeize and take, and during all that time of right ought to have ſeized and taken, upon the death of every tenant dying ſeized, &c., for and in reſpect of ſuch tenement; *and ſince the ſaid diviſion* the lord of the ſaid manor for the time being hath ſeized and taken, and been *accuſtomed* to ſeize and take, and ſtill ought to ſeize and take, after the death of every tenant dying ſeized of the ſaid moieties, or either of them, *in reſpect of each ſuch moiety* whereof he hath ſo died ſeized, one of the beaſts which were of ſuch tenant at the time of his death, ſo and in the name of a heriot cuſtom," &c. The plea then ſtated the admiſſion of the laſt tenant, his death, and the ſeizure of the two horſes as heriots. Replication—de injuriâ ſuâ propriâ, and traverſing the cuſtom in the words of the plea. At the trial before *Thomſon* B. at the laſt aſſizes

assizes at *Winchester* it appeared in evidence upon the 21st plea, that the *division* of the tenement therein mentioned was made *since the time of legal memory;* and the question made at the trial upon the construction of that plea was, whether it confined the division of the tenement to time beyond legal memory, or not? And a verdict was taken by the Judge's direction for the defendants on this, as well as upon certain other pleas; and for the plaintiffs upon the rest; with liberty for the plaintiffs to move to enter a verdict for them on the issue in question, and to add 41*l.* 10*s.* (the agreed value of the two horses) to the damages found for them on the other pleas, if the Court should be of opinion with them upon the construction of the 21st plea. The motion was accordingly made, and a rule nisi granted in the last term for this purpose; against which

Lens Serjt. and *Gaselee* now shewed cause, and contended that the evidence supported the substance of the plea; which did not necessarily import that the division of the tenement was before the time of legal memory; but it might be read either way. And they pointed the attention of the Court to the different manner in which the custom was laid as used and approved *before* the division of the tenement, and *since:* the allegation of its existence *from time whereof,* &c. only applied to it *before* the division; for the words *from time whereof,* &c. were not repeated in the allegation of its existence *since the said division,* &c.; but it was only alleged that *since the division* the lord had (in fact) seized and been accustomed to seize, &c.

But *the Court* (stopping *Burrough* and *Dampier* in support of the rule) said, that the whole was stated as one

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immemorial custom; which was disproved by shewing the division to have taken place within time of memory: and therefore made the rule absolute.

Monday, Jan. 25th.

PITT *against* GREEN.

A variance in setting out one of several covenants in a lease, on which breaches were assigned, viz. the *Cellar-beer* field, instead of the *Aller-beer* field; being considered as part of the description of the deed declared on; though the plaintiff waved going for damages on the breach of that covenant; is fatal.

IN covenant, the declaration set forth, that by indenture the defendant demised to the plaintiff a messuage at *Star Cross*, with the garden and four several fields belonging to the dwelling house, to hold for 21 years, at the rent of 150*l*.; and that the defendant thereby covenanted with the plaintiff, that he would repair all the premises; and under-ground-gutter the *Cellar-Beer* field; and set up a proper hedge to fence out the plot of ground on *Warborough*: and the declaration assigned breaches on all those covenants. The defendant pleaded non est factum, and six other pleas negativing the breaches of covenant; upon which issues were joined. At the trial before *Thomson*, B. at *Exeter*, on proving the lease, an objection was taken by the defendant's counsel, that there was a fatal variance between that and the lease declared on; the covenant in the lease produced being to under-ground-gutter the *Aller-Beer* field, instead of the *Cellar Beer* field, as stated in the declaration: and the point being reserved, the cause went on; and a verdict was found for the plaintiff on some of the issues on other breaches of covenant than that relating to the *Aller-Beer* field; with leave to the defendant to move to enter a nonsuit if the Court thought the objection well founded.

Pell now shewed cause against a rule obtained in last *Michaelmas* term for entering a nonsuit. He said it was a

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mere clerical miſtake; which in *Rolleſton* v. *Smith* (*a*) was held not to vitiate a certificate of regiſtry. And if, as was ſaid, in *Dundas* v. Lord *Weymouth* (*b*), it be only neceſſary to ſet out the ſubſtance of the covenant on which a breach is aſſigned, a variance in an immaterial part ſet forth, (and here the plaintiff waved proceeding on the breach of that part of the covenant) cannot be fatal. [*Le Blanc* J. The danger there ſtated was in ſetting out unneceſſary parts of the indenture, becauſe the plaintiff was liable to fail in his action if there were a variance in ſetting out even an immaterial part.] He then referred to *King* v. *Pippet* (*c*), and *Cuming* v. *Sibley* there cited (*d*), and *Warre* v. *Harbin* (*e*), where variances in ſetting out precepts were held immaterial: and to *Williams* v. *Ogle* (*f*), where the wrong ſpelling of a name, *Segrave* for *Seagrave*, in ſetting out a record, was ſaid to be idem ſonans, and no material variance. And ſuch, he contended, was *Cellar-Beer*, for *Aller-Beer*. And that this was not like the variance in *Wilſon* v. *Gilbert* (*g*), between the pariſh *St. Ethelburg* and *St. Ethelburga*; which the Court of *C. B.* thought might deſignate two different ſaints of different ſexes.

Lens Serjt. and *Dampier* contrà, were ſtopped by the Court.

Lord ELLENBOROUGH C. J. The counſel cannot argue with a greater deſire to get rid of the objection than the Court had in the firſt inſtance; and therefore, we wiſhed to compare the record with the deed, in order to ſee whether the word as written in the one would admit

(*a*) 4 *Term Rep.* 161. (*b*) *Cowp.* 665. (*c*) 1 *Term Rep* 235.
(*d*) *Ib.* 239. (*e*) 2 *H. Blac.* 113 (*f*) 2 *Stra.* 889.
(*g*) 2 *Boſ.* & *Pull.* 281.

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of being read as it appears in the other: but in the one it is so distinctly written *Cellar-Beer*, that we cannot read it *Aller-Beer*, as it distinctly appears written in the other: neither can we say they are the same word in sound. And being a sensible word as it stands in the record, we cannot reject it as surplusage. Then taking it as part description of the deed declared on, the variance is fatal.

Per Curiam, Rule absolute.

Tuesday, Jan. 26th.

CARDWELL *against* MARTIN.

A. and *B.* having exchanged their acceptances of bills drawn by each on the other at so many days date; held that the delivery of the respective bills for acceptance, and the re-delivery of the same by the acceptors to the respective drawers, was a negotiation of the bills; and that such bills could not, after they had been so exchanged for valuable consideration (as the exchange of acceptances is) for 20 days, be post-dated without a new stamp, as upon new bills; although during all that time each had remained in the hands of the original drawer.

THE plaintiff declared as indorsee of a bill of exchange against the acceptor; and it appeared that the bill in question which was drawn by *Giles* and Co. on the 3d of *June* 1807, payable to their own order, and accepted by the defendant at three months' date, was exchanged by him with *Giles* and Co. for their acceptance of a bill drawn by the defendant for the same sum at 85 days, payable to his order; the object being that *Giles* and Co. should put the defendant in cash before his acceptance became due. On the 23d of *June*, before *Giles* and Co. or the defendant had passed the respective securities to any other person, it was agreed to procrastinate the payment of the bills by post-dating them the 23d of *June*, instead of the 3d. And the question at the trial was, whether such an alteration could be made under these circumstances without a new stamp? Lord *Ellenborough* was of opinion, at the trial at the last sittings at *Guildhall*, that it could not; and nonsuited the plaintiff: but it was agreed that the jury should assess the damages; and if the Court thought that a new stamp was not necessary,

ceſſary, the plaintiff had leave to move to enter a verdict for ſo much. Which

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The *Attorney General* now moved for accordingly; contending that it was competent to the original parties, by whom the ſecurities were framed, to make any alteration in them before they were negotiated; each of the bills having remained, till after the alteration on the 23d of *June*, in the hands of its reſpective drawer. If this be not ſo, it ſeems difficult to ſupport the determination of this Court in *Lowe* v. *Waller* (*a*); where a bill of exchange in the hands of an innocent indorſee was avoided on account of an uſurious conſideration as between the indorſers and the acceptor, in whoſe hands it was placed by the drawer and payee for the purpoſe of raiſing money; though there were no uſurious conſideration ſtated as between the original drawer and payee and the acceptor. The Court therefore muſt have conſidered that while the bill remained in the hands of the firſt taker, and before it was negotiated, it was liable to the taint of uſury attached by the ſtat. 12 *Ann. ſt.* 2. *c.* 16. upon any *contract made* upon an uſurious conſideration. Though the general rule is, that if the bill be valid in its inception, an indorſee for a valuable conſideration, without notice, is not affected by any uſurious conſideration for paſſing the bill through the hands of intermediate holders (*b*).

The Court however were all of opinion in this caſe, that the objection was well founded. The delivery of the bill by the drawer to the acceptor, and the re-delivery of it to the drawer for a valuable conſideration, ſuch as the exchange of acceptances has been held to be ſince *Cowley* v.

(*a*) *Dougl.* 736. (*b*) Vide *Parr* v. *Eliaſon*, 1 *Eaſt*. 92.

 Dunlop

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CARDWELL *against* MARTIN.

Dunlop (*a*), was a negotiation of the bill. The several drawers were mutual purchasers of each other's acceptances. And while the bill in question was in this course of negotiation, and after it had continued so 20 days, during which time it was in the power of the drawer and payee to have passed it to any third person, the alteration was made. This was in effect drawing a new bill.

Rule refused.

(*a*) 7 *Term Rep.* 565.

Tuesday, Jan. 25th.

BUCHANAN *against* RUCKER.

The law will not raise an assumpsit upon a judgment obtained by default in one of the colonies against a party, who upon the face of the proceedings appeared only to have been *summoned* "by nailing up a copy of the declaration at the Court-house door;" it not appearing that he had ever been present in the colony, or subject to the jurisdiction of the Colonial Court at the time of the suit commenced or afterwards: although by a law of the colony if a defendant be *absent from the island*, and have no attorney, manager, or overseer there, such mode of summoning him shall be deemed good service: for the *absence* thereby intended is of one who had been *present* and subject to the jurisdiction; though even if it had been meant to reach strangers to the jurisdiction, it would not have bound them.

THE plaintiff declared in assumpsit for 2000*l.* on a foreign judgment of the Island Court in *Tobago*; and at the trial (*b*) before Lord *Ellenborough* C. J. at *Guildhall*, produced a copy of the proceedings and judgment, certified under the hand writing of the Chief Justice and the Seal of the island, which were proved; which, after containing an entry of the declaration, set out a summons to the defendant, therein described as "*formerly* of the city of "*Dunkirk*, and now of the city of *London*, merchant," to appear at the ensuing Court to answer the plaintiff's action; which summons was returned "served, &c. *by* "*nailing up a copy of the declaration at the Court-house door*," &c. on which judgment was afterwards given *by default*. Whereupon it was objected, that the judgment was obtained against the defendant, who never appeared to have been within the limits of the island, nor to have had any

(*b*) Vide 1 *Campbell's Ni. Pri. Cas.* 63.

attorney

attorney there; nor to have been in any other way ſubject to the juriſdiction of the Court at the time; and was therefore a nullity. And of this opinion was Lord *Ellenborough*; though it was alleged, (of which however there was no other than parol proof), that this mode of ſummoning abſentees was warranted by a law of the iſland, and was commonly practiſed there: and the plaintiff was thereupon nonſuited. And now

Taddy moved to ſet aſide the nonſuit, and for a new trial, on an affidavit verifying the iſland law upon this ſubject; which ſtated "That every defendant againſt whom any action ſhall be entered, ſhall be ſerved with a ſummons and an office copy of the declaration, with a copy of the account annexed, if any, at the ſame time, by the Provoſt Marſhal, &c. ſix days before the ſitting of the next Court, &c.; and the Provoſt Marſhal is required to ſerve the ſame on each defendant in perſon. But if ſuch defendant cannot be found, and is not *abſent from the iſland*; then it ſhall be deemed good ſervice by leaving the ſummons, &c. at his moſt uſual place of abode. And if the defendant be *abſent from the iſland*, and hath a power of attorney recorded in the ſecretary's or regiſtrar's office of *Tobago*, and the attorney be reſident in the iſland, or any manager or overſeer on his plantation in the iſland, the ſervice ſhall be either upon ſuch attorney perſonally, or by leaving it at his laſt place of abode, or upon ſuch overſeer or manager perſonally, or by leaving it *at the houſe upon the defendant's plantation where the overſeer or manager uſually reſides*. But if *no ſuch attorney, overſeer, or manager; then the nailing up a copy of the declaration and ſummons at the entrance of the Court-houſe* ſhall be held good ſervice,

Lord

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Lord ELLENBOROUGH C. J. There is no foundation for this motion even upon the terms of the law disclosed in the affidavit. By persons *absent from the island* must necessarily be understood persons who have been present and within the jurisdiction, so as to have been subject to the process of the Court; but it can never be applied to a person who for aught appears never was present within or subject to the jurisdiction. Supposing however that the act had said in terms, that though a person sued in the island had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the court door; how could that be obligatory upon the subjects of other countries? Can the island of *Tobago* pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction? The law itself however, fairly construed, does not warrant such an inference: for "*absent from the island*" must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the Court out of which the process issued: and as nothing of that sort was in proof here to shew that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an assumpsit in law upon the judgment so obtained.

Per Curiam, Rule refused.

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RAINE *against* BELL.

Tuesday, Jan. 26th.

It is not an implied condition in a common marine policy on ship and freight that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay or otherwise increasing the risk of the insurers: and therefore where a ship was compelled in the course of her voyage to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course by reason of a scarcity at her lading ports, and during her justifiable stay in the port so entered for that purpose she took on board bullion there on freight, which the jury found did not occasion any delay in the voyage; it was held not to avoid the policy.

THIS was an action on a policy of insurance "on the ship *Rio Nova*, and freight, from her loading port or ports on the coast of *Spain* to *London*, with liberty to touch and stay at any port or place whatever, without being deemed a deviation." The plaintiff declared on a loss by the perils of the sea. It appeared in evidence at the trial at *Guildhall*, that by the long continuance of the voyage from port to port in *Spain*, and the difficulty of obtaining provisions on the coast at that time, the ship's provisions had run very short, and she was obliged to put into *Gibraltar* to lay in a sufficient stock before her departure for *London*. But it also appeared, that while the ship lay at *Gibraltar* for that purpose the Captain received on board some chests of dollars on freight: and some question was at first attempted to be made whether the true object of going there was not to take on board these dollars; but the weight of the evidence was against this supposition: and finally Lord *Ellenborough* C. J. left it to the jury to say, whether the going into *Gibraltar* were of necessity in order to obtain a proper stock of provisions; and if so, whether the stay there were longer than was necessary for that purpose; telling them that in either case the policy would be avoided. The jury however affirmed the necessity of the ship's touching and stay at *Gibraltar* in order to lay in her provisions: and the loss of the ship being proved to have happened by the perils of the sea off the coast of *Cornwall* in her homeward-bound voyage, they found a verdict for the plaintiff for the amount of the defendant's insurance. But a question of

law

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law was raiſed, whether the taking in the additional cargo of dollars at *Gibraltar*, which was ſaid to be a *breaking bulk* in the courſe of the voyage at a place where there was no liberty to trade, did not avoid the policy; as increaſing or having a tendency to increaſe the riſk of the underwriters beyond the terms of the policy: and this it was contended by the defendant to do, on the authority of Lord *Kenyon* in *Stitt* v. *Wardell* (*a*), and of Lord *Ellenborough* in *Sheriff* v. *Potts* (*b*). And in order to diſcuſs this point, a rule niſi was obtained in the laſt term for ſetting aſide the verdict, and for a new trial; againſt which

The Attorney-General, *Park*, and *Dampier*, now ſhewed cauſe, and denied the application of the caſes cited to the preſent, as well as the reaſoning on which they were ſaid to be founded. The queſtion of deviation by going into *Gibraltar* is wholly removed by the finding of the jury, juſtifying the neceſſity of it. The only principle on which the *breaking of bulk*, properly ſo called, in the courſe of the voyage inſured, that is, the unſhipping of any part of the original cargo for the purpoſe of trading, can be deemed to avoid the policy, is on account of the delay thereby occaſioned, which increaſes the riſk of the underwriters, unleſs a liberty to ſtay and trade at the particular place be ſtipulated for. But that cannot apply to a caſe where the whole ſtay of the ſhip was covered by a juſtifiable neceſſity: and where not even the diſpoſition of any part of the original cargo could be altered by taking in a few cheſts into the cabin. In the caſe of *Stitt* v. *Wardell* there was

(*a*) Tried at the Sittings after *Michaelmas* term 38 *Geo.* 3. at *Guildhall*, 2 *Eſp. Ni. Pri. Caſ.* 609. and *Park on Inſur.*

(*b*) Sittings after *Michaelmas* term 44 *Geo.* 3. 5 *Eſp. Ni. Pri. Caſ.* 96.

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an actual breaking of bulk in the course of the voyage: for the ship having been driven by stress of weather into *Dublin* harbour, she continued there no less than three weeks, and during that time unloaded part of her cargo of coals and sold them. It does not appear by the report of the case, that the necessity which first brought the vessel into *Dublin* continued during the whole three weeks; nor is it probable that it should, as it does not appear that she was under repair during the time: and Lord *Kenyon*'s opinion turned upon the liberty *to touch* at any port not extending to a liberty of *trading* there. Besides, that was a case of the first impression; and can only be supported on the principle of the act done operating to increase the underwriter's risk; for there is nothing in the terms of the policy itself which prohibits even the unloading a part of the cargo, or the taking in other goods: such acts are only prohibited by implication, as they may occasion delay in the prosecution of the voyage insured: and if no delay be in fact occasioned, it seems difficult to say how the mere act of unloading part of a ship's cargo can increase the risk of the underwriters on the ship. [In answer to a question from the Court, they disclaimed any right to cover the freight of the dollars so taken in at *Gibraltar*: only contending that the taking them in did not avoid the policy on the ship or the freight of the original cargo insured.] The case of *Sheriff* v. *Potts* was ruled on the authority of the former case; with this additional circumstance, which was relied on by Lord *Ellenborough*, that there was a special liberty reserved "to touch and *discharge* goods at *Lisbon*" in the course of the voyage from *Guernsey* to *Gibraltar*; which was considered to be a virtual exclusion of the liberty of *taking in* a new cargo at *Lisbon*. They also reasoned by analogy from the

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case of hypothecation. Where a ship is driven into a foreign port by distress, and is obliged to repair, not only is it warrantable to unship the whole cargo for the purpose of the repair; but as the captain may hypothecate the cargo (*a*) as well as the ship for the expence of the repair, so he may unload and sell a part of the cargo for that express purpose.

Garrow and *Marryat* contrà. It is no answer to the objection that the policy does not expressly prohibit any alteration of the cargo in the course of the voyage by unloading part or taking in other goods, or as it is commonly and technically called the *breaking bulk*; which includes goods stowed in the cabin as well as under the hatches. There are many implied stipulations in favour of the underwriters, such as that a ship shall be properly documented; that she shall be sea-worthy; and have a sufficient complement of men and stock of provisions, &c. One of these is, that she shall not *trade* in the course of the voyage: and there is no distinction in this respect between a greater and less degree of trading; between unloading or taking in a single bale or package, or a hundred: any partial alteration of the cargo in the course of the voyage may affect the whole: it may or it may not in a particular instance occasion delay in the prosecution of the voyage: that will depend upon a variety of minute circumstances and considerations, which it is usually impossible for an underwriter to trace: but any degree of trading has a necessary tendency to create delay; it holds out a continual temptation to deviate from and delay the voyage: and it is on account of this necessary tendency, and the difficulty of discriminating how much delay is to

(*a*) Case of the *Gratitudine*, 3 *Rob. Adm. Rep.* 240.

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be attributed to neceſſity and how much to the trading, that the policy of the law raiſes an implied engagement in the aſſured, that the ſhip ſhall not trade at all in the courſe of the voyage, unleſs permiſſion to do ſo be expreſsly reſerved: and the very reſervation of ſuch expreſs permiſſion in certain caſes ſhews the underſtanding of the mercantile world that it is prohibited in all others. The caſes of *Stitt* v. *Wardell*, and *Sheriff* v. *Potts*, have judicially eſtabliſhed the implied prohibition againſt breaking bulk or trading in the courſe of the voyage: and it is better for all parties to abide by the plain broad rule of an entire prohibition, than to introduce a dubious queſtion into every caſe, how far the trading tended to delay. [*Lawrence* J. obſerved, that the facts reported in *Stitt* v. *Wardell* did not ſupport the reaſon ſaid to be given by Lord *Kenyon* for avoiding the policy, namely, that the holding the underwriters liable would be to make them *inſure a voyage not in their contemplation*; for there was no deviation in that caſe from the courſe of the voyage; but the ſhip was forced by ſtreſs of weather into *Dublin*.] If the liberty of trading be allowed at all, it will not be difficult to frame pretences of neceſſity from weather and accident to run into ports, or to protract a ſhip's ſtay there when really forced in for ſhelter.

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Lord ELLENBOROUGH C. J. If the taking in the dollars at *Gibraltar* materially varied the riſk of the underwriters, they would be diſcharged by it; but that it did not vary the riſk by occaſioning any delay of the voyage was expreſsly found by the jury to whom the queſtion was left, and who were of opinion that the whole period of the ſhip's ſtay there was covered by the neceſſity which originally

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nally induced the captain to go into *Gibraltar*. I have turned it in my mind whether the risk might not have been increased by the particular kind of cargo, namely, treasure, taken in there: if that were known at the time to an enemy, it might hold out an additional temptation to him to seek for and attack the ship. But I do not know that a mere temptation of this sort has ever been held a sufficient ground to avoid a policy if the original act itself were lawful. This, it must be remembered, is the case of a policy on ship and freight: I reserve giving any opinion as to the operation of a change in the state of the cargo in the case of a policy on *goods*; because the taking in of other goods in the course of one entire voyage, where it is not provided for, may be contended to constitute a different adventure from that on which the ship started with her original cargo. But here no part of the original cargo was taken out, as in *Stitt* v. *Wardell*; nor any narrower liberty reserved, as in *Sheriff* v. *Potts*, which might operate as a virtual exclusion of taking in other goods. But this case stands on its own ground: where something has been superadded to the original cargo while the ship was delayed from necessity in a port into which she was obliged to go; and the jury having negatived that any delay was occasioned by the taking in of the additional goods.

His Lordship, after the other judges had delivered their opinions, added, that nothing said by the Court would justify the taking in any cargo in the course of the voyage which would in any manner enhance the risk of the underwriters.

GROSE J. The good sense of the thing, in ascertaining whether or not the act done avoided the policy, is to know

know whether it did or did not increaſe the riſk of the underwriters. Now here the jury having negatived any deviation from or delay in the voyage on account of taking in the dollars at *Gibraltar*, there ſeems no reaſon for ſaying that the riſk of the underwriters was thereby increaſed; and therefore I will not diſturb the verdict.

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LAWRENCE J. I agree that the verdict is right. There is nothing in the terms of the policy to reſtrain the captain from taking in dollars: no additional riſk was incurred to the ſhip by the nature of the cargo, from the laws of the country where it was taken in; which might have altered the caſe: but the jury have found that the ſhip went into *Gibraltar* on a neceſſary occaſion, and did not ſtay there longer than that neceſſity juſtified. If *Gibraltar* had continued a port of *Spain*, there is no doubt but that the dollars might have been taken on board without vitiating the policy: but the objection is that becauſe *Gibraltar* is not a port of *Spain* the taking them in there avoids the policy, although it be found by the jury that no delay in the voyage was thereby occaſioned. This is not like a deviation; for that alters the riſk inſured; but here the riſk was not in fact altered. Then it is ſaid that it holds out a *temptation* to deviate. But if an *intention* to deviate, not carried into effect, will not avoid a policy; ſtill leſs can a temptation to deviate; as in *Moſs* v. *Byrom* (*a*). If the doing of a thing do not alter the riſk of the underwriter, and be not expreſsly prohibited to be done; I cannot ſay that it vitiates the policy as upon the breach of an implied condition. The caſe of *Stitt* v. *Wardell* paſſed at niſi prius, and was not afterwards brought in review before the

(*a*) 6 *Term Rep.* 379.

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the Court; and though it was the opinion of a moſt eminent judge; yet the greateſt are liable to error in delivering their opinions on the ſudden. And if the ſame queſtion ſhould occur again, I think it will deſerve further conſideration: for unleſs it can be ſhewn that the underwriters' riſk is varied by taking out part of a cargo in the courſe of the voyage, as at preſent adviſed, I do not underſtand how it can avoid the policy.

LE BLANC J. I am of the ſame opinion. Two caſes have been relied on to ſhew that the mere fact of taking out and ſelling part of the cargo, or the taking in other goods in the courſe of the voyage, will avoid the policy: but thoſe were deciſions at niſi prius, which were never brought before the Court, and might have turned on the particular circumſtances of thoſe caſes. But now the queſtion is fairly raiſed and brought before the Court, we muſt decide it according to the principle by which marine policies of inſurance are governed in reſpect of implied conditions. It is ſaid, that becauſe liberty is ſometimes expreſsly reſerved for a ſhip to touch, ſtay and trade in the courſe of the voyage, it is impliedly excluded in every policy in which it is not ſo reſerved; but the reaſon of the expreſs reſervation is in order to juſtify *the delay* in trading; the ſtaying at a place for the very purpoſe of trading there: but if a ſhip touch at a port which is allowed, and ſtay there for any reaſon which is allowable within the intent and meaning of the policy, and no additional riſk to the underwriters be incurred by her trading there during ſuch her ſtay for an allowed or juſtifiable cauſe, I can ſee no reaſon why ſuch a trading ſhould in itſelf avoid the policy. It is ſaid however, that the giving liberty to trade at all will be a temptation to the maſter to deviate from and to de-

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lay the voyage with that view, and that it will be difficult for the underwriters to detect it: but that must necessarily be a question for the jury to decide, as in other cases of fraud, whether the deviation or delay arose from necessity or from the trading; and wherever the case was doubtful upon the evidence, it would generally turn the verdict against the assured who would have to account for the delay or deviation. But where it is found that no delay was occasioned by the trading, I see no reason why we should imply a condition which the parties themselves have not made, in order to avoid the policy as for a breach of it. Neither do I think it would be generally convenient to increase the number of small circumstances unconnected with the occasion of the loss which will relieve the underwriters from their engagement to indemnify the assured, by the introduction of new implied conditions which the parties do not express in the policy.

Rule discharged.

The KING *against* The Inhabitants of the Township of ST. BEES Quarter, in the Parish of ST. BEES.

Wednesday, Jan. 25th.

Payment by one who was assessed to a church rate upon *householders* only, and not upon the parishioners at large, will nevertheless gain him a settlement for it is not less a *public tax* because laid too narrowly; and it is *charged and paid* within the parish, which is all that is required by the stat. 3 *W.* 3. *c.* 11. *s.* 6.

TWO Justices by an order removed *Sarah Tidyman* widow, and her four children by name, from the parish of *Egremont* to the township of *St. Bees*, both in the county of *Cumberland*; which order was confirmed by the Sessions on appeal, subject to the opinion of the Court on the following case;

The pauper *Sarah*, 26 years ago, married *John Tidyman*, who was settled at *St. Bees*, and went from thence to reside with him in *Egremont*; and they occupied a

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houfe there till his death, two years ago. A year after they occupied the houfe, *J. Ponfonby*, a churchwarden of *Egremont*, called at the houfe for an affeffment, (generally called in the parifh a *couple fefs*, but which the pauper *Sarah* underftood to be a *church fefs*,) and told her that her hufband was affeffed; and fhe paid 1*s*. 2*d*. as the fum affeffed. Fifteen years ago *D. Saunderfon*, another churchwarden of the parifh, alfo called at the houfe for an affeffment, and told the pauper that her hufband was affeffed, and fhe paid him 1*s*. A fimilar demand for an affeffment was alfo made in 1791, by two churchwardens; and the pauper again paid 1*s*., which latter affeffment was in this form:

"1791.

"An affeffment upon the houfeholders in the parifh of *Egremont* at 1*s*. per couple for the ornaments and repairs of the parifh church." *s*.

× *John Tidyman* . . . 0 1 0

"We whofe names are hereunto fubfcribed (being of the church veftry) do allow of this as a regular affeffment; as witnefs our hands, the 28th of *March* 1791."

(Signed by the minifter and 8 other perfons, including the two churchwardens.)

The names of 132 other houfeholders of the parifh, befides *John Tidyman*, were included in the affeffment, and the × oppofite his name denoted that his affeffment had been paid. It appeared from the churchwardens' accounts of that year, entered in the veftry book, that the fums received under that affeffment were in part laid out on the repairs and ornaments of the church, and the reft in payment of a debt due to the preceding overfeers. But that affeffment not being fufficient, another was made in the fame year, in aid of it, upon the landholders of

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the parifh, who were never affeffed but when the affeffment upon the houfeholders proved infufficient. And it was frequently the practice for the felect veftry of the parifh to make out thefe affeffments in the form of a lift of the names of the inhabitants liable to pay; charging the married houfeholders at 1*s.* each; and widowers and widows, houfeholders, at 6*d.* each; which affeffments were aferwards fubmitted to and approved by the general parifh veftry. The Seffions adjudged that the pauper's hufband had not gained a fettlement in *Egremont* by the above ratings and payments.

Topping, in fupport of the order of Seffions, contended that the rate was clearly bad on the face of it. It was made upon the *houfeholders* only, and not upon the *parifhioners* at large: and therefore no fettlement could be gained by being affeffed to and paying it. He admitted that a mere irregularity in the manner of rating would not preclude one from gaining a fettlement who paid under it; as in *St. Giles, Cripplegate*, and *St. Mary, Newington* (*a*): but he urged that this was no rate at all, but a mere nullity; in which cafe, according to *Rex* v. *Edgbafton* (*b*), no fettlement could be gained by payment of it.

Lord ELLENBOROUGH C. J. The fettlement is given by the ftat. 3 *W.* 3. (*c*) to any perfon inhabiting any town or parifh, who fhall be charged and pay his fhare towards the public taxes or levies of the town or parifh. Now if a public tax be laid too narrowly, is it lefs a public tax on that account? This was a *tax*, and it was

(*a*) 19 *Vin. Abr.* 386. and 1 *Seff. Caf.* 22. (*b*) 6 *Term Rep.* 540.
(*c*) *C.* 11. *f.* 6.

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public, and it was *charged* and *paid* within the parish What else is required to meet the act of parliament? Suppose a particular chapelry within the parish had been omitted in the rate, it would not have been less a public tax on the rest of the parish.

Le Blanc J. The objection, pushed a little further, would go to invalidate every settlement under a rate wherein one person was improperly omitted.

Per Curiam, Order of Sessions quashed.

Park and *Littledale* were to have argued against the order.

Wednesday, Jan. 27th.

The King *against* The Inhabitants of Norton, Juxta Kempsey.

A deserter from the king's marine service cannot gain a settlement under a hiring and service for a year; not being sui juris, nor competent *lawfully* to *hire* himself within the stat. 3 *W. & M.* c. 11. s. 7.

TWO justices by an order removed *Sophia* the wife of *Edward Lea*, a marine, and their infant child *William*, from the hamlet of *Oversley* to the parish of *Norton*, both in the county of *Worcester*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case.

Edward Lea, being legally settled at *Norton*, was duly enlisted as a private into his majesty's marine forces, from which he deserted, and then hired himself for a year to Mr. *Shayle* of *Oversley*, and served a year under that hiring. After the determination of this service he was taken up for desertion, tried by a court martial, and convicted of the same. The question for the opinion of the Court was, whether he gained a settlement in *Oversley*

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(which maintains its own poor) by virtue of such hiring and service. 1808.

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Reader and *B. Morice*, in support of the order of Sessions, contended that a soldier who had deserted from the king's service was not sui juris, and could not within the words and meaning of the stat. 3 *W. & M. c.* 11. *s.* 7. be *lawfully* hired. He could not contract the relation of servant to any other master, the duties of which were inconsistent with those which he owed to the king. Upon the same principle it has been determined in several cases (*a*) that an apprentice, not being sui juris, cannot contract himself as a servant to a third person, nor gain a settlement under a hiring and service. The case of the soldier is even stronger than that of an apprentice; for the former is guilty of a crime by deserting the king's service; whereas the latter is only liable civiliter: and the policy of the law is much stronger against the power to contract a second engagement for service in the one case than in the other.

Reynolds and *Birch*, contrà, endeavoured to distinguish this from the case of an apprentice, which, they said, turned altogether upon the restrictive force of the indenture, and could not therefore apply to any case of a previous engagement by parol to serve another. In the case of a general hiring, if the servant depart before the stipulated time of service, the only remedy by the master is by an action on the contract; but it never was disputed

(*a*) *Buckington* v. *Shepton Bechamp*, 2 *Const's Bott*, 570. 2 *Ld. Ray.* 1352. and 1 *Stra.* 582. *Rex* v. *Austrey*, *Burr. S. C.* 441. *Rex* v. *Ecclesal Bierlow*, *ib.* 562. *Rex* v. *Harberton*, 1 *Term Rep.* 139. and 2 *Const's Bott*, 576. *Rex* v. *Sandford*, 1 *Term Rep.* 281. *Rex* v. *Hindringham*, 6 *Term Rep.* 557.

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but that if the servant immediately after made a new contract of hiring for a year, and served under it, he would gain a settlement: and the first master could not maintain an action against the second for the wages or work and labour of the servant. But it is otherwise in the case of an apprentice, for the recompence for whose work and labour as a servant the original master, and not the apprentice himself, may maintain an action against the second master after notice. It is true that the king might have interfered, and defeated the service to the master by taking the pauper away; but the contract would still have been binding on both the parties to it; and as on the one hand, if the service were thus interrupted, the master would have had a remedy for the breach of contract against the servant; so on the other hand, where the service was in fact performed, the servant has his remedy upon the contract for the stipulated wages. The word *lawful*, in the statute of King *William*, means a contract of hiring and service lawful in the terms of it, and not within the exceptions of any of the statutes relating to servants. It has been held in *Rex* v. *Westerleigh* (*a*), and *Rex* v. *Winchcomb* (*b*), that a *militiaman* might gain a settlement by hiring and service, though he were absent part of the time on duty; the term of his absence having been stipulated for by him: and yet the same objection would have applied to him, that he was not sui juris; for he might have been called out on duty the whole time.

Lord ELLENBOROUGH C. J. That was the case of a lawful contract with a just exception. The public had a

(*a*) *Burr. S. C.* 753. (*b*) *Dougl.* 391.

claim

claim upon the militiaman's service for a certain time; and subject to that claim he might lawfully contract to serve his master. If this case were perfectly res integra, there might have been great doubt whether the word *lawfully* in the statute of King *William* were not to be narrowed in its construction to a contract in *the terms of it lawful*: and if the contract were lawful in its form, it might have afforded an argument whether the party serving under it could be disabled from gaining a settlement under it, by reason of his having before contracted an engagement with another person inconsistent with it. But a variety of cases have occurred which have decided the question in the case of an apprentice: and this, not on the ground of its being an excepted case, or as standing upon any occult efficacy in the indenture of apprenticeship; but upon the broad principle that one, who has contracted a relation which disables him from serving any other without the consent of his first master, is not sui juris, and cannot lawfully bind himself to serve such second master, so as to gain a settlement by serving for a year under such second contract. In reason and principle it cannot make any difference whether he be originally bound by a contract of apprenticeship, or by any other contract equally obligatory upon him, which disables him from binding himself to serve a second master. The objection is, that he cannot give the master a control over his service for the whole period which the master stipulates for and has a right to require by the contract. The king's officers might at any time have reclaimed him, and taken him out of the service in which he was engaged; he cannot therefore be said to have been *lawfully* hired into it. The remedy which the master might in that case have had against him is another question: and the very want

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want of power to bind himſelf, as he aſſumed, without authority, to do, might have founded a cauſe of action againſt him by the maſter. But a ſoldier is at leaſt as much bound to the ſervice of the king, as an apprentice is to that of his maſter: and nothing is to be inferred from the meaſured language of the Court in the caſe of an apprentice, in not laying down the principle broader than the matter in judgment required: but nothing was ſaid by the Court in any of the caſes intimating an opinion that the rule there laid down was confined to the ſingle caſe of an apprentice; and therefore we muſt look to the reaſon and principle of thoſe deciſions when we are called upon to apply the rule to ſimilar caſes.

Grose J. The words of the ſtatute have been conſidered, and a conſtruction put upon them in the inſtance of an apprentice; and I cannot diſtinguiſh this caſe in principle from that.

Lawrence J. The deciſions referred to have concluded the preſent queſtion, if they were not made upon any ground peculiar to the caſe of an apprentice: but, as I underſtand them, they proceeded upon the ground that an apprentice was not ſui juris, and could not therefore ſubject himſelf to the control of a ſecond maſter for a whole year under a contract of hiring. And that principle will equally govern the preſent caſe.

Le Blanc J. The prior caſes have decided this. The principle of them is, that if the party cannot make ſuch a contract for his ſervice, of which the maſter may avail himſelf for the whole year according to the contract, no ſettlement can be gained under it.

Orders confirmed.

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The KING *against* The Inhabitants of STOW-MARKET.

Wednesday, Jan. 27th.

A poor boy fent out of the houfe of induftry at 14 years of age to the parifh officers, and by them *allotted* to a parifhioner, who handed him over to another perfon, by whom the boy was told that he was to ftay with him a year, and fhould have clothes, &c.; to which the boy made no objection; conceiving himfelf obliged to accept the fervice; but made no agreement for wages or concerning the nature or duration of his fervice, nor was confulted upon the fubject; does not gain a fettlement by ferving under this fuppofed obligation for a year; for neither did he confider himfelf, nor was he confidered by the other parties, as a free agent; and fuch only can contract, or adopt a contract made by others.

JOHN EDWARD KING, a pauper, and his wife were removed by an order of two juftices from *South Lopham* in *Norfolk* to *Stowmarket* in *Suffolk*. The Seffions, on appeal, confirmed the order, fubject to the opinion of this Court on the following cafe:

J. E. King, the pauper, being fettled by birth in *Stowmarket*, was in the year 1801 a poor boy, at the age of fourteen, in the houfe of induftry for the poor of the incorporated hundred of *Stow*. In this hundred the directors and acting guardians of the faid houfe are empowered by the act incorporating the hundred to apprentice poor children for feven years. It does not appear that they ever exercifed this power: but inftead of binding the children apprentices when of fufficient age, they were fent out of the houfe to their refpective parifhes; and the parifh officers allotted them during three years to particular parifhioners, either to retain them in their own, or to provide them with other fervices. Some time before *Michaelmas* 1801 the pauper *J. E. King* was fent by the directors and acting guardians of the houfe to Mr. *Reynolds* of *Stowmarket*, to whom he had been previoufly allotted by the officers of that parifh. Mr. *Reynolds*, not having employment for the pauper, told him that he (Mr. *Reynolds*) had procured a fervice for him with Mr. *J. Fox* of *Coddenham*. The pauper made no objection to go, conceiving that he had no difcretion on the fubject. On the day after *Michaëlmas* the pauper went to Mr. *Fox*, who received him, and told him that he would give him

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him cloaths, and that he was to ſtay with him a year. Nothing further paſſed between the pauper and Mr. *Reynolds*, or Mr. *Fox*, reſpecting wages, or the nature or duration of the ſervice. The pauper continued in Mr. *Fox*'s ſervice as a farming ſervant till the following *Michaelmas*; receiving his cloaths and maintenance, and now and then a little pocket money. On the 25th of *September* 1802 the pauper was ſent for by Mr. *Stutter* of *Stowmarket*, to whom he had been allotted (in the ſame manner as he had been in the former year to Mr. *Reynolds*) for the following year. On the enſuing *Michaelmas* day the pauper went to Mr. *Stutter*, who gave him a holiday on that and the following day; and having no occaſion for his ſervice, Mr. *Stutter* told the pauper that he had procured him a ſervice with a relation, Mr. *Froſt*, of *Brent Eleigh*. The pauper went to Mr. *Froſt*, without making any application to the directors and acting guardians, or to the pariſh officers, and continued with Mr. *Froſt* till *Michaelmas* 1803, in the ſame ſituation as he had done before with Mr. *Fox*. The pauper himſelf made no agreement with Mr. *Fox*, or with Mr. *Froſt*, reſpecting wages, or the nature and duration of his ſervice with them; nor was he conſulted on the ſubject either by Mr. *Reynolds*, or by Mr. *Stutter*, to whom he had been previouſly allotted; but conceived himſelf obliged to accept theſe ſervices, as being under the control and juriſdiction of the houſe of induſtry and of the pariſh officers of *Stowmarket*, where the directors and acting guardians had firſt ſent him.

Wilſon and *Hulten*, in ſupport of the orders, inſiſted that there was no contract of hiring at all, and of courſe the pauper could gain no ſettlement by his ſervice

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vice with either of the mafters to whom he was, in the language of the cafe, *allotted*. And the Court called on the counfel for the appellant parifh to proceed.

Nolan and *Frere*, contrà, contended that though the boy himfelf had made no contract with either of the mafters whom he ferved, yet that by his fervice he muft be taken to have acceded to the terms made on his behalf by the guardians of the poor, or thofe who ftood in their place, and therefore to have adopted the contract of hiring made by them on his behalf. In the cafe of *The King* v. *Rickinghall Inferior* (*a*) the relation of mafter and fervant did not fubfift at all, but the pauper was only placed out by the parifh officers to lodge and board: but here he was exprefsly taken by the mafter to ferve him as a fervant; and the pauper affented to this by performing the fervice and receiving his cloathing and maintenance. Then the pauper's mifapprehenfion of the effect of his contract has often been determined not to be material.

Lord ELLENBOROUGH C. J. All the parties feem to have acted under the idea that the boy was a parifh flave, who might be handed over from one to another and difpofed of as they pleafed. But there was no agreement by him to either of the fervices in which he was engaged: he fubmitted to them becaufe he thought himfelf obliged to do whatever they bid him. If we were to hold this fufficient to give a fettlement, we fhould eftablifh a new head of fettlement *by allotment*. The law gave thefe directors of the houfe of induftry a certain power to apprentice out poor children; and inftead of executing that

(*a*) 7 *Eaft*, 371.

power

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power in a proper manner as the act directs, they assume to themselves a power to hand these children over to the officers of their respective parishes; who again hand them over to others; and so they are shifted from one to another. And now because the boy has done the work which he was made to do, and eat the meat and worn the clothes which were provided for him, it is argued that he has adopted so many contracts of hiring to which he was no party, and which were made without any consideration of his will and consent. But the adoption of a contract must be the act of a free agent: and at what period of time is he found by the case to have consented or contracted at all? On the contrary it is stated that when told by *Reynolds* that he had procured a service for him with *Fox*, the pauper made no objection to go, *conceiving that he had no discretion on the subject*. And again it is stated that *the pauper made no agreement with* Fox *or* Frost, *respecting wages, or the nature and duration of his service with them:* nor *was he consulted on the subject by either of the persons to whom he had been allotted; but considered himself obliged to accept these services, as being under the control* of others. Then can a person who is considered as a slave, and conceives himself to be such, be considered as having *adopted* the acts of his masters? It is against common sense so to construe his involuntary acquiescence. In the cases alluded to, where the pauper's misapprehension of the contract of hiring has been held not to vary the legal effect of it, the pauper meant to exercise a contracting power, though he mistook the legal effect of the contract which he had made.

The other Judges assented; and *Le Blanc* J. added, that he hoped the consequence of this decision would put an

an end to the improper practice which the directors of the house of industry had adopted in sending the children out of the house to the respective parish officers to place out, instead of providing for them in the manner pointed out by the act.

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Orders confirmed.

ELIZABETH HORN, Executrix of JOHN HORN, *against* BAKER and Another, Assignees of WM. HORN and RD. JACKSON, Bankrupts.

Friday, Jan. 29th.

A., *B.*, and *C.*, partners and distillers, occupied certain premises leased to *A.* and another, and used in common in the trade the stills, vats, and utensils necessary for carrying it on, the property of which stills, &c. afterwards appeared to be in *A.* On the dissolution of the partnership, which was a losing concern, it was agreed that *C.* and one *J.* should carry on the business on the premises; and by deed between the two last and *A* it was covenanted and agreed, that *A.* should withdraw from the business, and permit *C.* and *J.* to use, occupy, and enjoy the distill house and premises, paying the reserved rent, &c. and the several stills, vats, and utensils of trade specified and numbered in a schedule annexed, in consideration of an annuity to be paid by *C.* and *J.* to *A.* and his wife and the survivor; with liberty for *C.* and *J.* on the decease of *A.* and his wife to purchase the distill-house and premises for the remainder of *A.*'s term, and the stills, vats, &c. mentioned in the schedule: and *C.* and *J.* covenanted to keep the stills, vats, and utensils in repair, and deliver them up at the time, if not purchased: and there was a proviso for re-entry if the annuity were two months in arrear. Under this, *C.* and *J.* took possession of the premises, with the stills, vats, and utensils, and carried on the business as before; and made payments of the annuity, which afterwards fell in arrear more than two months; but *A.*'s widow and executrix who survived him did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of *C.* and *J.* who continued in possession of the stills, vats, and utensils on the premises.

On a question, Whether such stills, vats, and utensils, so continuing in possession of *C.* and *J.* the new partners, and used by them in their trade in the same manner as they had been by the former partners, of whom *A.* the owner was one, passed under the stat. 21 *Jac.* 1. *c.* 19. *s.* 10 & 11. to the assignees of *C.* and *J.*, as being in the *possession, order, and disposition* of the bankrupts at the time of their bankruptcy as *reputed owners*? and nothing appearing to the world to rebut the presumption of true ownership in the bankrupts arising out of their possession and reputed ownership, (of which reputed ownership the jury are to judge from the circumstances;) held,

1. That the stills which were fixed to the freehold did not pass to the assignees under the words *goods and chattels* in the statute.

2. That the vats, &c. which were not so fixed, did pass to the assignees, as being left by the true owner in the possession, order and disposition (as it appeared to the eye of the world) of the bankrupts, as reputed owners.

3. That the case would have admitted of a different consideration if there had been a usage in the trade for the utensils of it to be let out to the traders; as that might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of them.

THIS was an action to recover in damages the value of the interest which the plaintiff claimed in certain stills, vats, and utensils, which the first count of the de-

claration

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claration stated that she was entitled to, subject to the use thereof by the defendants during her life; and that being so entitled, and the defendants well knowing the same, they wrongfully and injuriously broke and destroyed part, and sold and disposed of the rest. The second count was in trover for the same goods: to which the defendants pleaded not guilty; and upon the trial before Lord *Ellenborough* C. J. at the *Middlesex* Sittings after the last term, a verdict was found for the plaintiff for 1000*l.* subject to the following case.

The plaintiff is the widow and executrix of her deceased husband *John Horn*, who before and at the time of making the indenture of the 20th of *March* 1801, after mentioned, was a distiller in *Southwark*. The defendants are the assignees of *Wm. Horn* and *R. Jackson*, who succeeded *John Horn* in the business of a distiller, and carried on the same until they became bankrupts, as after mentioned. At the time of making the said indenture *John Horn* held the principal part of the messuages, buildings, and lands, whereon he had carried on the business of a distiller in partnership with *Robert Horn* and *William Horn*, and whereon there had been erected a rectifying distill-house, under a lease granted to him and *R. Jackson*, (since dead,) for a term which expired on the 30th of *Dec.* 1804: and he held other parts of the premises under another lease granted to him and the said *Richard Jackson*, since deceased, for a term which expired on the 24th of *June* 1805: and he and the said *Richard Jackson*, now deceased, had before held other parts of the premises under a lease for a term which expired on the 25th of *Dec.* 1799. The abovementioned partnership, which was a losing concern, expired before the making of the indenture hereinafter mentioned; and *William Horn*, at the time of making that indenture, and

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at the death of *John Horn*, was and now is indebted to the estate of *John Horn* in 500*l.* in respect of their partnership. By indenture dated the 20th of *March* 1801, between *John Horn* of the one part, and *Wm. Horn* and *Rd. Jackson* (the bankrupts) of the other; after reciting the said several leases, and that at the time of making the last lease, the said *Rd. Jackson* (deceased) was in partnership with *John Horn*; and that *John Horn* had lately entered into partnership with *Wm.* and *Robert Horn* for a term then expired; and that since the expiration of the last-mentioned lease the premises therein comprised had been used and occupied by *John*, *Robert*, and *Wm. Horn* as yearly tenants; and that the partnership between *John*, *Robert*, and *Wm. Horn* had before the execution of that deed been dissolved by mutual consent; and that it had been agreed between *John Horn* of the one part, and *Wm. Horn* and *Rd. Jackson* of the other part, that *John Horn* should withdraw from the business as from the 1st of *March* then instant, in favour of *Wm. Horn* and *Rd. Jackson*, and permit them to use, occupy, and enjoy the said distill-house and other the premises mentioned in the indentures of lease, *and the several vats, stills, and utensils of trade therein or thereon*, and which vats, stills, and utensils were specified in the first schedule written under that indenture, in consideration of an annuity of 600*l.* to be paid to *John Horn*, his executors, &c. during the life of himself and *Elizabeth* his wife (the now plaintiff) and the life of the survivor, subject to terms and conditions thereinafter expressed: and reciting farther, that it had been agreed that the debts due to *John*, *Robert*, and *Wm. Horn*, as late copartners, and also all the horses, carts, drays, and casks of the late copartnership (*except the vats, stills, and utensils* mentioned in the said first schedule,) should

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should be valued, and purchased by *Wm. Horn* and *Rd. Jackson*; and that a valuation had been made accordingly; by which it appeared that such debts, and the value of such horses, &c. amounted to 1815*l.*; for payment of which a bond had been given by *Wm. Horn* and *Rd. Jackson* to *John Horn*; and that *Wm. Horn* and *Rd. Jackson*, by another bond, had been bound to *John Horn* in 5000*l.*, conditioned for payment of the annuity of 600*l.* per annum to *John Horn* for the lives of himself and his wife, (the plaintiff,) and the survivor: he, *John Horn*, in pursuance of the agreement, and in consideration of the two bonds and the covenants and agreements after contained on behalf of *Wm. Horn* and *Rd. Jackson*, for himself, his heirs, executors, &c. covenanted and agreed with *Wm. Horn* and *Rd. Jackson*, their executors, administrators, and assigns, that they, *well and truly paying the rents reserved* by the several recited leases, *and performing all and singular the covenants and agreements therein contained* on the lessees' and assignees' parts, and also *duly and regularly paying the said annuity* so secured as aforesaid, should and lawfully might *peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuage*, tenement, distill-house, and premises thereby demised and mentioned in a certain deed-poll indorsed on the said first lease, and *also the said stills, vats, and things, specified in the first schedule*, during the lives of *John Horn* and *Elizabeth Horn*, or the survivor, without any let, suit, &c. of *John Horn*, his executors, &c. or any person lawfully claiming from him, &c. *Wm. Horn* and *Rd. Jackson*, by the indenture of agreement, covenanted to pay the rent reserved by the leases, and to perform the covenants. There was also a proviso in that indenture, that *in case the annuity should be in arrear for two calendar months*, John Horn, *his executors*,

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executors, &c. might re-enter the diſtill-houſe and premiſes, and the ſame with all and every the ſtills, vats, and things mentioned in the ſaid ſchedule have again, re-poſſeſs, and enjoy as in his former eſtate, &c. There was alſo a covenant, that upon the deceaſe of the ſurvivor of *John* and *Elizabeth Horn, Wm. Horn* and *Rd. Jackſon* ſhould be at liberty to purchaſe the diſtill-houſe and premiſes for the remainder of the term in the leaſes, and the ſtills, vats, and things mentioned in the ſaid ſchedule. And another covenant that *Wm. Horn* and *Rd. Jackſon* ſhould keep the ſaid ſtills, vats, and utenſils in repair; and in caſe they ſhould not purchaſe the ſame, that they ſhould at the end of the agreement deliver them up to *John Horn*, his executors, &c. in good condition, reaſonable uſe and wear excepted. [Then followed the ſchedule referred to of the different ſtills and vats, numbered in order, and deſcribing the quantity in gallons which each would contain.] The caſe further ſtated, that *Wm. Horn* and *Rd. Jackſon* took poſſeſſion of the premiſes immediately on the execution of the indenture of agreement, and carried on the trade of diſtillers; and from time to time paid the intereſt on the bond and the annuity to *John Horn*, who died about four years ago, and who by his will gave all his property to his wife, the plaintiff, and appointed her ſole executrix. Since (*a*) the death of *John Horn* neither the annuity nor the intereſt of the bond for 1815*l.* have been regularly paid; but the plaintiff, as ſhe from time to time was in want of money, and notwithſtanding the annuity and intereſt might not be then due, applied to *Wm. Horn* and *Rd. Jackſon*, who

(*a*) What follows down to letter *b* was added by conſent to the caſe after the firſt argument.

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paid her different sums on account of such annuity and interest; and also by her order occasionally paid sums to various persons for her use, and supplied her with liquors and spirits as she from time to time ordered any; so that there was a running account between them and the plaintiff. The following memorandum was signed by *John Horn*, and indorsed on that part of the deed in the possession of *Wm. Horn* and *Rd. Jackson*; viz. "I the within-named *John Horn* do hereby undertake and agree to accept and take 500*l*. by equal quarterly payments instead of 600*l*. for the first year's annuity within referred to." To this memorandum there was no date, nor did it appear when it was made. The following indorsement or receipt was also written on the said deed, and signed by the plaintiff as executor of *John Horn*; viz. "*March* 1st, 1802. Received of the within-named *Wm. Horn* and *Rd. Jackson* 500*l*., being one year's annuity due from them this day for the purposes specified herein." There was also the following indorsement on the same deed signed by *Elizabeth Horn*. "*March* 1st, 1803. Received of the within-named *Wm. Horn* and *R. Jackson* 600*l*., being one year's annuity due from them this day for the purposes specified therein." The first memorandum appeared to be in the hand-writing of the solicitor who drew the deed: the two last receipts were in the hand-writing of *Rd. Jackson*. For many months previous to the bankruptcy of *Wm. Horn* and *Rd. Jackson* the plaintiff found great difficulty in obtaining money from them; and she permitted the annuity and interest to run in arrear; and *notwithstanding the same were more than two months in arrear*, the plaintiff did not make any claim to *re-enter* the premises, as by the deed she had the power to do; but in *May* 1806 brought an action in this court against

Wm.

Wm. Horn and *Rd. Jackson* to recover the arrears of the annuity, as alſo to obtain payment of the bond for 1815*l.* and intereſt; to which action they pleaded eight ſeveral pleas, upon ſeven of which iſſue was joined: and to the eighth plea *Elizabeth Horn* demurred; which demurrer was argued, and judgment given for *Elizabeth Horn*; and notice of trial of the ſaid iſſues had been given at the time of the bankruptcy; but in conſequence thereof that cauſe was not further proceeded in; and there was due for the arrears of the annuity and intereſt on the bond for 1815*l.*, at the time of the bankruptcy, about 600*l.* (*b*). In *April* 1805 *the plaintiff*, after her huſband's death, *renewed the leaſes of the ſeveral premiſes. Wm. Horn* and *Rd. Jackſon* occupied the premiſes, with the ſtills, vats, and utenſils thereon, and carried on the trade of diſtillers from the time of executing the indenture of the 20th of *March* 1801 to their bankruptcy. A commiſſion of bankrupt iſſued againſt *Wm. Horn* and *Rd. Jackſon* on the 26th of *July* 1806, and they were duly adjudged bankrupts on the 28th; and the meſſenger under the commiſſion immediately took poſſeſſion of the demiſed premiſes, and alſo of the vats, ſtills, and utenſils then being thereon. The defendants were afterwards choſen aſſignees, and an aſſignment of all the eſtate and effects of *Wm. Horn* and *Rd. Jackſon* was duly made to them; upon which notice was given by the plaintiff to the defendants that the ſeveral vats, ſtills, and utenſils were the property of the plaintiff, ſubject to the ſuppoſed intereſt of the bankrupts therein. The things mentioned in the deed, and compriſed in the firſt ſchedule, conſiſt of ſtills

(*b*) See note (*a*), p. 219.

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and vats. The (*a*) ſtills, five in number, were ſet in brick-work, and let into the ground. Three vats or worm-tubs were ſupported by and reſted upon brick-work and timber, but were not fixed in the ground. Sixteen other vats ſtood on horſes or frames made of wood, which were not let into the ground, but ſtood upon the floor (*b*). The vats were of wood, bound round with iron: the ſtills were of copper; and connected with ſome of the vats: others of the vats were alſo connected and communicated with each other by conductors or pipes. Three ſtills and vats were in the rectifying diſtill-houſe. There were alſo a great number of other vats under the rectifying diſtill-houſe; ſome of which were ſtanding on brick and timber, and others on horſes or frames as above; and which were connected with the vats and ſtills in the rectifying diſtill-houſe. Others of the vats ſtoods on horſes or frames, as above deſcribed. All the vats in the rectifying diſtill-houſe ſtood on their ends; as as did nine of thoſe under the diſtill-houſe: the other vats under the diſtill-houſe lay on their ſides or bilge. The defendants contending, that the vats, ſtills, and utenſils, in the ſaid firſt ſchedule contained, belonged to the bankrupts at the time of their bankruptcy, have ſold them as part of the eſtate and effects of the bankrupts. The plaintiff, contending that the ſame belong to her as executrix of her late huſband, by virtue of his will (ſubject to the the uſe thereof by the aſſignees in right of the bankrupts during her life,) has brought this action to recover in damages the value of her intereſt therein. The queſtion was, Whether the plaintiff were entitled to recover? it

(*a*) What follows down to letter *b* was added by conſent to the caſe after the firſt argument.

being

being agreed that if the plaintiff were so entitled, the amount of the damages should be settled out of court. 1808.

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This case was argued in *Michaelmas* term last by *Burrough* for the plaintiff, and *Dampier* contrà; and again in this term by *Williams* Serjt. for the plaintiff, and *The Attorney General* for the defendants. The additions to the case which have been noticed were made between the first and second argument.

For the plaintiff, (after stating that the question turned on the stat. 21 *Jac.* 1. *c.* 19. *s.* 10 & 11,) the attention of the Court was called to the preamble to the 11th sect, set forth in the conclusion of the 10th; though it was admitted that the modern cases had put a construction upon the enacting clause beyond the particular mischief recited. The statute reciting "that it often falls out that "many persons before they become bankrupts do convey "*their* goods to *other* men upon good consideration, yet "still do keep the same, and *are reputed the owners thereof*, "and *dispose the same as their own*;" for remedy enacts, "that if any person shall become bankrupt, and, at such "time as they shall so become bankrupt, shall, by the "consent and permission of the true owner and proprie-"tary, have in their *possession, order, and disposition*, any "goods or chattels whereof they shall be *reputed owners*, "and *take upon them the sale, alteration, or disposition, as* "*owners*;" in every such case the commissioners shall have power to sell and dispose the same for the benefit of the creditors, &c. Giving effect to the words of the preamble, the true object was to deprive particular creditors of their specific lien on goods, which having been the property of the bankrupt had been secretly conveyed by him to such creditors, who suffered him still to continue in possession and appear to the world

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as the owner. That provision was made in the case of bankrupts in order to avoid the doubt which had arisen upon the stat. 13 *Eliz. c.* 5. against fraudulent conveyances to defeat and delay creditors in general, (and which doubt still exists on the statute of *Elizabeth*) whether it were not confined, as at common law it certainly was, to avoid the conveyance as against those only, who were creditors of the party at the time. Wherefore the statute of *James* extended the provision to all the creditors, as well those who became such afterwards, as those who were such at the time of the conveyance. But still construing the two statutes together, as made in pari materia, many great lawyers have considered that the preamble in the 10th sect. of the stat. 21 *Jac.* 1. *c.* 19. controlled the enactment in the 11th sect. and confined the operation of the statute to cases where the property conveyed to a particular creditor was before that time the property of the bankrupt himself. Of this opinion was Lord C. J. *Holt* and the Court of *K. B.* in *L'Apostre* v. *Le Plaistrier* (*a*), and Lord C. B. *Parker*, and Lord *Hardwicke*, in *Ryall* v. *Rolle* (*b*): though the contrary has since been held in *Mace* v. *Cadell* (*c*). Still, however, the Court will not go further than the latter case; nor say that the statute shall attach in every instance where a trader is in possession of another man's goods at the time of his bankruptcy, if he were not held out to the world as the ostensible owner by the real proprietor, as in that case the bankrupt had been; the true owner having there held out the bankrupt as her husband, and having obtained a licence for the public house where they lived in his

(*a*) *Mich.* 1708, cited 1 *P. Wms.* 318.

(*b*) 1 *Atk.* 175. 182. and 1 *Vez.* 365. 371.

(*c*) *Cowp.* 232.

name,

name. But taking the preamble not to control the operation of the enacting clause, still, in order to bring the case within that clause, the bankrupts must not only have such goods in their *possession, order, and disposition* at the time *by the consent and permission of the true owner*, according to the first part of the clause, but they must also have taken upon them the *sale, alteration*, and *disposition* of them, as owners, by the same *consent and permission*; for these words run through both parts of the sentence: and it must appear either by the terms of the contract between the bankrupts and the true owner, or by evidence dehors of the nature of the property, or of the place or circumstances of the possession, that the owner trusted the bankrupts with the *power* of *selling, altering, or disposing of the goods, as owners*; or that having the possession, order, and disposition of the goods under such circumstances as might induce the world to believe that they had such a power, the bankrupts did *actually sell, alter, or dispose* of them, *as owners*. In *Walker and Others, Assignees of Bean*, v. *Burnell* (*a*), household goods and furniture, which were left by the assignees under the first commission so long as seven years in the bankrupt's possession; yet having been so left for a special bonâ fide purpose, in order to assist the bankrupt in settling his affairs, and getting in his effects for the creditors; and the bankrupt not having the disposition of the goods so as to sell them; were decided not to be within the statute of *James*. It was admitted even in *Mace* v. *Cadell* that every instance of a possession of goods of another by a bankrupt at the time of his bankruptcy was not within the statute; but it was said that the cases of factors, executors, trustees, &c. were *excepted* cases: but the words of the 11th clause, if not restrained by the preamble, are general, and

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(*a*) *Dougl.* 317.

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would include thofe which are called *excepted* cafes, as well as any others: they are not, therefore, excepted by the ftatute itfelf in terms, but only by conftruction, as not falling within the reafon of it: the ftatute only attaching on the poffeffion of goods by the bankrupt when fuch poffeffion is fraudulent; where the true owner has trufted the bankrupt with the power of felling, altering, or difpofing of the goods, as owner. And though perhaps the bare fact of the poffeffion of chattels may be primâ facie evidence that the poffeffor is the true owner, and has the power of fale, &c. as owner; yet the contrary may be fhewn, and that the poffeffion of the bankrupt was bonâ fide, and confiftent with the right of the true owner. A factor is intrufted with the higheft power over the goods, the power of fale; but becaufe it is not *as owner*, but *as factor*, which is confiftent with his poffeffion and with the rights of the true owner, the cafe is not within the ftatute. The fame may be faid of truftees and executors. So here, the bankrupts had "the poffeffion, order, and difpofition" of the goods under the indenture, *as leffees*, and not *as owners*; and they had not the *fale* or *alteration* of them at all, nor the *difpofition* of them, *as owners*, fo as to affect the property in any way, but only the bare ufe of them. In fome cafes the circumftances attending the poffeffion may carry an appearance to the world that the poffeffor has the fale, alteration, or difpofition of the goods, as owner; as where goods ufually fold in a fhop or warehoufe are expofed to view there; and from thence a power to fell, &c. by the confent of the owner who permits this to be done may be fairly implied: but no fuch inference can arife here, where fome of the vats, &c. were actually fixed to the freehold, and others apparently fo, and the reft were ufed

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in like manner as those which were fixed, and all of them were numbered. In this case the possession was at least equivocal, so as let in the truth of the ownership. It was just as likely by the mere view of the things that they belonged to the owner of the premises as to the traders who were in possession. They all formed one entire apparatus for distilling, part of which was actually fixed to the freehold; and therefore the bare possession and use of them carried no greater evidence of title than the possession of the premises themselves. And on this ground *Buller* J. in *Walker* v. *Burnell* (*a*), held that the furniture of the house left in the possession of the bankrupt did not pass under the statute. Wherever the contract between the bankrupt and the true owner, to whom the goods originally belonged, has been bonâ fide, and not made for the purpose of giving him a false credit, and the bankrupt's possession and mode of using the property was consistent with such contract, the case has never been held to be within the statute. In *Copeman* v. *Gallant* (*b*), though Lord *Cowper* considered that the preamble did not restrain the enacting words of the clause; yet he held the case not to be within it, in regard that the assignment, which was for payment of the debts of the assignor, was with an *honest intent*. In *Ryall* v. *Rolle* (*c*) the property, which originally belonged to the *bankrupt*, was by him mortgaged and conveyed at different times to several persons; he continuing all the time in possession. That was a fraud directly within the express words of the law. In *Mace* v. *Cadell* (*d*) there was direct evidence of fraud on the part of the true owner; she herself having taken out a licence for the public house, where the goods were,

(*a*) *Dougl.* 320.
(*b*) 1 *P. Wms.* 320, 2.
(*c*) 1 *Atk.* 165. and 1 *Vef.* 349.
(*d*) *Cowp.* 232.

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in the name of the bankrupt, to whom she said she was married; and having at first claimed the goods under a bill of sale from him. *Bryson* v. *Wylie* (*a*) was decided altogether upon the ground of trick and fraud. There was an open sale of a dyer's plant to the bankrupt, and afterwards a private re-sale by him; notwithstanding which he still continued to keep possession upon payment of a pretended rent. *Gordon* v. *The East India Company* (*b*) was the case of goods invested by the true owner *in the name* of an officer of one of the Company's ships, as *his* privilege; whose property they appeared to the world to be; and which was therefore calculated to deceive his creditors. So in *Lingham* v. *Biggs* (*c*), a creditor, having taken in execution the furniture of a coffee-house-keeper, permitted him to remain in possession of it under a rent; who therefore appeared to the rest of the world to continue the owner of it in the same manner as before; there being nothing done to notify the change of property; which was clearly fraudulent even within the preamble of the statute. But in that case Lord C. J. *Eyre*, speaking of *Bryson* v. *Wylie*, said that, notwithstanding that decision, he could suppose that a dyer might be in possession of a plant without being the reputed owner. And he also supported the decision in *Collins* v. *Forbes* (*d*), which had been questioned (*e*). But admitting that there were some circumstances of fraud in the last-mentioned case, the principle there established,

(*a*) *Hil.* 24 *Geo.* 3. *B. R.* cited in note (*a*) 1 *Bos.* & *Pull.* 83.

(*b*) 7 *Term Rep.* 228. (*c*) 1 *Bos.* & *Pull.* 82. (*d*) 3 *Term Rep.* 316.

(*e*) By *Lawrence* J. in *Gordon* v. *The East India Company*, 7 *Term Rep.* 237. who now again intimated great doubts of that case, as did also Lord *Ellenborough*. The former referred to Mr. *Cullen's Observations* on that case, which he said were very sensible. *Cull. Principles of the Bankrupt Laws*, 318.

which

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which has not been queſtioned, was, that where the bankrupt was in poſſeſſion of the goods at the time of his bankruptcy, with the conſent of the true owner, bonâ fide, for a ſpecial purpoſe, beyond which he had not the right of alteration or diſpoſition, it is not within the ſtatute. The caſe of *Darby* v. *Smith* (*a*) was conſidered as an abſolute ſale of the goods by the truſtees of the wife and children to the huſband, whom they ſuffered to continue in poſſeſſion till the day before his bankruptcy without his paying the ſtipulated inſtalments. It would have been uſeleſs to have diſcuſſed any of theſe caſes if the bare act of poſſeſſion of the goods of another by a bankrupt at the time of his bankruptcy were ſufficient to bring a caſe within the ſtatute. Now here by the terms of the deed the bankrupts had no power over the vats, ſtills, and utenſils in their poſſeſſion, except the uſe and repair of them as leſſees: they had not the general, but only a ſpecial *order* and *diſpoſition* of them by the conſent of the true owner: and they had no power of *ſale, alteration*, or *diſpoſition* of them at all, *as owners*. But if the conſent or permiſſion of the true owner mentioned in the firſt part of the 11th clauſe be not carried to the "*ſale, alteration, or diſpoſition*" mentioned in the latter part; at leaſt thoſe words muſt be intended of an *actual ſale, alteration, or diſpoſition* of the things by the bankrupt, in order to bind the true owner; for the words of the act are "*and take upon them* (the bankrupts) the ſale, &c. "as owners;" which is not pretended to have been done by the bankrupts in this caſe. Conſiſtently with the deed the leſſees could not even have removed theſe goods from the premiſes demiſed to any other place, without an implied breach of covenant, to be collected from the

(*a*) 8 *Term Rep.* 82.

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whole deed; for they were all scheduled and numbered, and let as an entirety; and if displaced, it could not be told how the numbers applied, and the object of numbering them would be defeated.

It was also objected to the plaintiff's title, that the possession of the lessees at the time of their bankruptcy was not consistent with the deed; because they were only to hold so long as they performed the covenants and paid the annuity reserved; and there was a proviso for re-entry in case such annuity was in arrear for two months: and no re-entry had been made, though the annuity was in arrear for a longer time. To this it was answered that the words of the indenture whereby *John Horn* covenanted that the lessees "performing all and singular "the covenants and agreements therein contained, &c. "and also *duly and regularly paying the annuity*, &c. "should quietly possess and enjoy, &c. the premises, "and also the stills, vats," &c. were not words of condition, on the breach of which the lessees were no longer to hold over, but in law were only words of covenant on the part of the lessees, for the breach of which a remedy lay upon the covenant; as was determined in *Hays* v. *Bickerstaffe* (a). Then, though there was an express power of re-entry in case of such arrear, yet it could not have been executed under the circumstances; for there was a running account between the parties; the plaintiff having received money on account of the annuity from time to time, and the bankrupts having also paid bills for her; and this account was not liquidated. But to warrant a re-entry there must be a demand of the precise sum due, which could not be told by the plaintiff at the

(a) 2 Mod. 34, 5.

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time. Befides, as in cafe of rent referved quarterly, when two quarters have elapfed, the leffor cannot re-enter for the firft quarter, but only for the laft; having flipped his opportunity for the other, after another quarter has become due: fo here the plaintiff could only have re-entered for the laft payment in arrear. But fuppofing in ftrictnefs that the plaintiff might have re-entered, yet as it would not have been prudent to do fo, fhe will ftand excufed for waving the exercife of an odious right of forfeiture, againft which a court of equity would of courfe have relieved the leffees, on payment of the arrears: and this, even fince the ftat. 4 *Geo.* 2. *c.* 28. *f.* 2. if the application for relief were made within fix months (*a*).

For the defendants, it was contended that the poffeffion of the bankrupts was not confiftent with the deed; for by that, in the event which happened of the annuity falling into arrear, the plaintiff was entitled to enter and take poffeffion of the goods in queftion; inftead of which fhe left them in the poffeffion of the traders, and brought an action for the arrears, which was defeated by their bankruptcy. As to the difficulty of making a demand for the precife fum before re-entry, the ftrictnefs of law in that refpect only applies to cafes of re-entry for non-payment of rent where the demand muft be on the land, and not to the re-poffeffion of goods for non-payment of an annuity for which they were a fecurity, in which cafe the demand may be made any where. However, if a previous demand of the precife fum were neceffary, the difficulty of afcertaining it, occafioned by the act of the annuitant herfelf, would be no reafon why as between thefe parties fhe fhould be excufed for not having made it. If fhe were entitled to poffeffion under the deed in the

(*a*) *Doe* v. *Lewis*, 1 *Burr.* 614.

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the event which happened, and by taking the neceſſary meaſures, whatever they might be, would have been in poſſeſſion, the ſubſequent poſſeſſion of the bankrupts was againſt the ſtipulations of the deed: and this brings the caſe within *Darby* v. *Smith* (*a*), which is very like the preſent in its circumſtances; for there the truſtee had a right to enter and re-poſſeſs himſelf of the goods, if the ſtipulated payments were not made; and having neglected to do ſo, after default made in all but the firſt inſtalment, the poſſeſſion of the bankrupt was held to be within the ſtatute; though as between the parties to the contract the tranſaction was bonâ fide, and no fraud in fact intended. But admitting that the poſſeſſion of the bankrupts was in purſuance of the deed, it does not follow that their poſſeſſion was not within the ſtatute. If this were ſo, every caſe of this ſort might be taken out of the ſtatute. The poſſeſſion of a mortgagor of goods is not inconſiſtent with his title, and yet it has never been doubted ſince *Ryall* v. *Rolle* (*b*) that it was within the ſtatute. It is the *reputed ownerſhip* of the goods in the poſſeſſion of the bankrupt which brings the caſe within the expreſs words of the ſtatute, the avowed object of which was to defeat thoſe ſecret conveyances, by which perſonal property is ſecured to particular creditors, while to the eye of the world it is left in the *poſſeſſion, order, and diſpoſition* of the bankrupt who by means of it obtains a falſe credit. It is now fully ſettled ſince the caſe of *Mace* v. *Cadell* (*c*) that the preamble does not control the enacting words of the 11th clauſe of the act. But it is argued, that the bankrupt muſt not only have the *poſſeſſion, order, and diſpoſition* of the goods, with the conſent of the true owner, but alſo the power of *ſale, alteration, and diſpoſition* by the ſame *conſent*. Certainly the bankrupt need not

(*a*) 8 *Term Rep.* 82. (*b*) 1 *Atk.* 165. (*c*) *Cowp.* 232.

have

have actually sold and delivered the goods; for then the question would never arise, as was observed by *Eyre* C. J. in *Lingham* v. *Biggs* (a); for the act only gives the assignees of the bankrupt power to appropriate goods *in his possession*. But the same learned Judge says, that "if the man be *reputed owner* of the goods, and *appear* to have the *order and disposition* of them, he must be understood to have taken upon himself the *sale, alteration, and disposition* within the meaning of the statute." Neither could it be the meaning of the statute that the bankrupt should be the true owner of the goods, because, as Lord *Hardwicke* said in *Ryall* v. *Rolle* (b), the Legislature has explained its sense by putting the words *true owner* in opposition to the *reputed owner*. Nor could it mean that the bankrupt should have the *power of sale*, &c. by the *consent of the true owner;* for then his selling or otherwise disposing of them would be no breach of the private contract between them. In every case where any question can arise, the reputed ownership of the bankrupt must be limitted, as between him and the true owner, by some secret stipulation abridging the general right of disposition: and it was the very object of the act to prevent the operation of such secret engagements, which enabled traders to obtain a false credit by means of the apparent or reputed ownership which their visible possession of the goods of others gave them. It is no question therefore in these cases what is the real contract in the deed; for that could not be known at the time to third persons who were dealing with the trader. The only question which can be made, consistently with the words and object of the statute, is, whether the trader in possession at the time of his bank-

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(a) 1 *Bos. & Pull.* 87. (b) 1 *Atk.* 183.

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ruptcy had the apparent order and difpofition of the goods? if to the eye of the world he appeared to be the owner of them, or was, as the ftatute calls him, the *reputed owner*, the cafe is within the ftatute; though in truth there was a fecret conveyance or agreement by which the property was made over or fecured to another. This, as was faid by *Buller* J. in *Walker* v. *Burnell* (*a*), muft always be more a queftion of fact than of law. When the fact of the reputed ownerfhip is clearly afcertained, the law follows of courfe. Every man, fays *Eyre* C. J. in *Lingham* v. *Biggs* (*b*), who can be faid to be the *reputed owner*, has incidentally the order and difpofition of goods: and if he be reputed owner, and appear to have the order and difpofition of them, he muft be underftood to have *taken upon himfelf* the *fale*, *order*, *and difpofition*, within the meaning of the ftatute. And if the real owner do not take fuch means as may be in his power to prevent the public being impofed upon by fuch falfe appearance, that is the very mifchief meant to be remedied by the act; and the bankrupt muft be taken to have the poffeffion, order, and difpofition of the goods by confent of the owner: and the being in poffeffion under fuch circumftances from whence the order and difpofition of the goods may be reafonably inferred makes the reputed ownerfhip. Now here every circumftance of notoriety tended to fhew that the bankrupts were the true owners of the goods, whether confidering the poffeffion before the indenture of the 30th of *March*, the time and circumftances under which the bankrupts took poffeffion under that deed, the avowed purpofe for which it was made, or the conti-

(*a*) *Dougl.* 317. and vide this noticed by *Eyre* C. J. in *Lingham* v. *Biggs*, 1 *Bof.* & *and Pull.* 89.

(*b*) 1 *Bof.* & *Pull.* 87.

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nued poſſeſſion and apparent ownerſhip of the bankrupts after the transfer in the ſame manner as before. *William Horn*, one of the bankrupts, had been in partnerſhip with *John Horn*, the teſtator, before the transfer: they carried on buſineſs jointly upon the ſame premiſes, and had a joint uſe of the vats, ſtills, &c., and to the eye of the world at leaſt the property belonged to the partnerſhip, however it might be as between themſelves. *Rd. Jackſon* had alſo an intereſt with *John Horn* in the leaſe. The buſineſs was a loſing concern; and *John Horn*, wiſhing to get out of it, appeared to the world to withdraw himſelf from it; and *Wm. Horn* appeared to continue in poſſeſſion of the premiſes and of the vats, ſtills, and utenſils for carrying on the buſineſs, together with *Rd. Jackſon*, and to exerciſe the ſame acts of ownerſhip as he had done before when in partnerſhip with *John Horn.* But in fact *John Horn* had ſecretly conveyed this property to *Wm. Horn* and *Rd. Jackſon*, ſaddled with the annuity to himſelf and his wife, which was likely to ruin the trade more rapidly than before. But there was no notice of the change to other perſons dealing with the partnerſhip; the deed was kept ſecret from them; the object of all the parties being, that the trade might be carried on by the exiſting partners with the ſame apparent capital as the old firm, and that the credit of the new partnerſhip might not be leſſened by the general knowledge of the fact, that the goods in queſtion were not their property. The ſecrecy of the transfer was as much for the benefit of *John Horn* as of the continuing partners; for if their credit were ſhaken, they would be leſs able to pay the ſtipulated annuity. In fact the bankrupts did gain a falſe credit by the poſſeſſion of the goods in queſtion. There is no fact of notoriety to reſiſt the concluſion that theſe

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were the goods of the bankrupts: and the only fact relied on to shew that the property was not theirs is the secret indenture of the 20th of *March* 1801, by which a prior claim on the goods was secured to *John Horn*; but such a secret transfer is of the very species of fraud which the statute meant to guard against. The case of *Bryson* v. *Wylie* (a) cannot be distinguished from this in principle. The bankrupt there had the possession of the dyer's plant, but he had not paid for it; he therefore agreed to assign it to the creditor, and to take it again on lease from him. There was no mala fides or fraud in the transaction as between those two; and if the interest of no other person had been concerned, it was only just and reasonable that the creditor should have had his security: yet that was avoided by the operation of the statute, as fraudulent in law against the creditors in general. The case of *Darby* v. *Smith* (b) is strong to the same point. The case of *Walker* v. *Burnell* (c) turned as it seems on the notoriety of the goods which were left in the bankrupt's possession continuing the property of the assignees under the first commission: but that is a very doubtful case. The honesty of the intent of the true owner cannot be sufficient to protect the goods; for according to the report of *Copeman* v. *Gallant* in 7 *Vin. Abr.* 89. Lord *Cowper* said, "if possession and disposition be given to a person who becomes bankrupt, *though no intent of fraud appear*; yet, if it give a false credit, there is the same inconvenience as if fraud were intended, &c.; and it matters not whether it were by fraud, or only by neglect, or out of a humour." And this was admitted in *Bucknell* v. *Royston* (d) in the case of a bankruptcy.

(a) *Hil.* 24 *Geo.* 3. *B. R.* cited in 1 *Bos. & Pull.* 83.

(b) 8 *Term Rep.* 82. (c) *Dougl.* 317. (d) *Prec. in Chan.* 287.

In

In the course of the argument *Grose* J. asked whether there were any usage in the trade for distillers to hire or lease vats, stills, &c. with their premises? To which it was answered by the defendant's counsel, that no such usage appeared; and unless it were expressly found by the case, the presumption would be, that things necessary to carry on the trade were provided by the traders themselves: and that the possession of such things, which were of great value, must naturally give more credit to the distillers than the mere view of the spirits distilled, which often belonged to others. Lord *Ellenborough* C. J. also observed at the conclusion of the argument, that nothing had been said with respect to the distinction between such of the vats and stills as were affixed to the freehold, and those that were moveable, and would be the subject of trover; between which, he said, the Court thought that there was a material distinction; the words of the statute of *James* being *goods and chattels*. And upon asking *The Attorney-General* whether he meant to insist upon the right of the assignees to such of the articles as were fixed to the freehold; and referring to in *Ryall* v. *Rolle*; and being answered in the negative; his Lordship said that if the rest of the Court agreed with him in opinion as to the right of the assignees to such of the articles as properly fell under the denomination of goods and chattels, it would be better to leave it to a referee to ascertain out of court the difference of the value for which the verdict should be entered.

Lord ELLENBOROUGH C. J. then proceeded.—The true object of the statute 21 *Jac.* 1. *c.* 19. *f.* 10 & 11, was to make the *reputed* ownership of goods and chattels in the possession of bankrupts, at the time of their bankruptcy, the

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the *real* ownerſhip of ſuch goods and chattels, and to ſubject them to all the debts of the bankrupt: conſidering that ſuch reputed ownerſhip would draw after it the real ſale, order, alteration, and diſpoſition of the goods. The ſtills, it appears, were fixed to the freehold; and as ſuch, we think, would not paſs to the bankrupt's aſſignees under the deſcription of goods and chattels in the ſtatute. But as to the vats and utenſils, there is nothing in the caſe to rebut the reputed ownerſhip following the poſſeſſion of the bankrupts after the diſſolution of the old firm, when the buſineſs was continued to be carried on by the bankrupts alone in the ſame manner as it followed the poſſeſſion of the antecedent partnerſhip when the trade was carried on by *John*, *Robt.* and *Wm. Horn*. Before the deed of the 20th of *March* 1801, though *John Horn* might have had a priority of claim to the ſtills, vats, and utenſils, as between him and his partners; yet to the eye of the world the apparent ownerſhip of them was in the partners, *John*, *Robert*, and *William Horn*. After the deed *John* demiſed theſe things to *Wm. Horn* and *Richard Jackſon*, who continued to carry on the trade after he had retired from it, finding it to be a loſing concern; and inſtead of reſerving a rent, he reſerved an annuity payable to himſelf and his wife and the ſurvivor of them, with a liberty to the new partners to purchaſe theſe articles on the death of ſuch ſurvivor. Under this agreement *Wm. Horn* and *Richard Jackſon* continued in poſſeſſion of the property, carrying on the trade in the ſame manner as was done before; and to the eye of the world the property of theſe goods appeared to be veſted in them in the ſame manner as it appeared to be in the former partnerſhip. As between the parties to the contract, the new partners could not indeed ſell, alter, order, or diſ-

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pofe of the property but according to the provifions of that deed: but as to the world in general they appeared to have the fame right over it which the former partners had. Had they not then the *reputed* ownerfhip? If, as in fome manufactories, where the engines neceffary for carrying on the bufinefs are known to be let out to the feveral manufacturers employed upon them, there had been a known ufage in this trade for diftillers to rent or hire the vats and other articles ufed by them for the purpofe of diftilling, the poffeffion and ufe of fuch articles would not in fuch a cafe have carried the reputed ownerfhip. But in the abfence of fuch a ufage, there is nothing ftated in the cafe which qualifies the reputed ownerfhip arifing out of the poffeffion and ufe of the things in their trade. The world would naturally give credit to the traders on their reputed property; and the perfon who permitted them to hold out to the world the appearance of their being the real owners ought to be anfwerable for the confequences, and was fo intended to be by the ftatute. For fome time it was vexata queftio whether the preamble controlled the enacting words, fo as to confine the operation of the ftatute to cafes where the bankrupt was the original owner of the property conveyed by him to the particular creditor; but the enacting words have been long held not to be fo controlled. Here, in fact, the bankrupts were only leffees of thefe goods; but that was a fecret known only to the parties themfelves; and nothing appeared to teach the world that the bankrupts could not bind the property to the full extent of it. This is a cafe then which comes within the fair conftruction of the enacting words. The cafe of *Bryfon* v. *Wylie* bears ftrongly on the prefent; for that was not the cafe of a mortgagor keeping poffeffion of goods, as

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might be ſuppoſed from the note of what was ſaid by Lord *Mansfield*: but the plaintiff, who was the original owner of the plant, finding that *Simpſon*, to whom he had ſold it on the ſecurity of two promiſſory notes, was not able to pay the notes when due, agreed to take back the plant and give up the notes, and to let the plant to *Simpſon* at a rent: under which agreement *Simpſon* continued in poſſeſſion of it up to the time of his bankruptcy. Mr. Juſtice *Buller* there diſtinguiſhed the caſe from that of a banker or factor who by the courſe of trade muſt have the goods of other people in his poſſeſſion; and therefore it did not hold out a falſe credit to the world. He meant therefore to ſay that where the poſſeſſion did hold out a falſe credit to the world, there the ſtatute would follow it, and attach upon the goods. And the caſes of *Mace* v. *Cadell*, and *Lingham* v. *Biggs*, are authorities to the ſame purpoſe. The principle to be deduced from all of them is, that where the reputed ownerſhip of the goods in the trader is permitted to be held out to the world, it ſhall, with reſpect to the world, be conſidered as the real ownerſhip. I do not enter into the queſtion, whether the bankrupts' poſſeſſion were conſiſtent with the deed; becauſe that would only apply to the time after which the plaintiff might have re-entered for non-payment of the annuity. Her not doing ſo might perhaps be argued as more diſtinctly ſhewing her intention to exhibit the apparent ownerſhip of the bankrupts to the world: but I lay no ſtreſs on it; for in my view of the caſe, however conſiſtent their poſſeſſion might have been with the deed, it would only have ſhewn that the deed itſelf was the fraud which the ſtatute meant to guard againſt. The principle is, that in all caſes where, by the conſent and permiſſion of the true owner of goods, a trader

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a trader in possession has the apparent ownership, and incidental to that the order and disposition of them; and no other circumstance appears to control such apparent ownership, and shew that the trader was not the real owner; the true owner permitting the trader to exhibit this appearance does it at his peril.

GROSE J. The case of *Mace* v. *Cadell* has put a construction upon the statute, which has ever since settled, that where the real owner of goods suffers a trader to have the reputed ownership, so as to have the apparent order and disposition of them, and the trader becomes bankrupt, the statute gives the property to the assignees for the benefit of the creditors. I only doubted whether the stills which were fixed to the freehold would pass under this statute; but it is now agreed that they do not. But with respect to the other articles, it is impossible to distinguish this case in principle from the current of those which have been decided, which have gone upon the ground, that where the real owner enables a trader to acquire credit by having the possession, and apparent order and disposition of goods with respect to the world, he does in effect permit such trader to take upon himself, and he has with respect to the world, the apparent sale, alteration, and disposition of the goods, within the meaning of the statute.

LAWRENCE J. The question in these cases, as was observed by Mr. Justice *Buller* in *Walker* v. *Burnell*, is rather a question of fact than of law. And therefore it seems more proper in such cases to leave it to the jury to say whether, under the circumstances, the bankrupt had the reputed ownership of the goods at the time; for if the

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the true owner ſuffer a trader to have the reputed ownerſhip of goods left in his poſſeſſion, and he become bankrupt, the ſtatute ſays that the property ſhall go to his aſſignees. In this caſe therefore we are rather called upon to conſider, as upon a motion for a new trial, what concluſion a jury ſhould have drawn from this evidence, than to conſider a dry queſtion of law. The facts ſtated are, that one partner upon retiring from buſineſs leaſes to others who continue it, (one of whom had been in partnerſhip with him before,) certain ſtills, vats, and utenſils proper for carrying on the buſineſs, and which had been uſed by the former partners. The new partners become, in conſequence, to the world the apparent owners of the property. It may happen from the courſe of certain trades, that maſſes of machinery are let out by the owners to the mechanics engaged in them, and the notoriety of ſuch a uſage in the trade may rebut the preſumption of ownerſhip which would otherwiſe ariſe from the poſſeſſion; but in general the poſſeſſion of utenſils of trade muſt be taken to be by the owners of them. And I agree, that nothing turns upon the queſtion whether or not the poſſeſſion of the bankrupts in this caſe were conſiſtent with the deed under which they claimed from *John Horn*: for the very object of the ſtatute was to prevent the true owner from enabling another to hold himſelf out to the world as ſuch, and thereby gain a falſe credit: and this being a ſecret deed, the world could know nothing of its contents. It was preſſed in the courſe of the firſt argument, that the reputed ownerſhip mentioned in the ſtatute muſt be underſtood where there was a power of ſale confided to the bankrupt by the true owner; and reference was made to the words of Lord *Mansfield* in *Mace* v. *Cadell*, that the ſtatute did not extend to all poſ-

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fible cafes where one man had another man's goods in his poffeffion, as the cafe of factors, &c. who have the poffeffion as truftees, &c. *to fell for the ufe of their principal:* " but the goods muft be fuch as the party fuffers the trader *to fell as his own.*" But this laft expreffion was evidently ufed in contradiftinction to the cafe of factors, &c. who fold for other perfons and not for themfelves. And he could not have meant to lay it down generally; for that was not the cafe of a fale; but the facts there were, that the owner let the bankrupt into her houfe, where he paffed as her hufband: but fhe never gave him the power of felling the goods, and he never had fold them: yet by treating him as her hufband fhe had given him the reputation of being the owner of the goods; which was held to bring the cafe within the ftatute. As to the cafe of *Bryfon* v. *Wylie*, on which my Lord has obferved, Lord *Mansfield* certainly confidered the whole as a trick and contrivance to evade the ftatute: and what was faid by Mr. Juftice *Buller* goes the whole length of our opinion in this cafe; that a factor, who muft in the courfe of his bufinefs have other perfon's goods in his poffeffion, does not thereby gain a falfe credit; but that where the conduct of the true owner enables another in whofe hands the goods are to hold out to the world the reputation of ownerfhip, he thereby gives that other a falfe credit to the extent of the property fo confided; for which the ftatute meant to make him refponfible. It is often a queftion of fact whether the poffeffion of goods do hold out a reputed ownerfhip in the poffeffor, as in the cafe of furniture in lodgings. In the prefent cafe, the opinion which we have formed from the facts ftated will make it neceffary to inquire which of thefe articles are fixtures, and which are not: and for the

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value

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LE BLANC J. The queftion is, whether the bankrupts having obtained the reputed ownerfhip of the moveable utenfils of the trade by poffeffion of them before and at the time of the bankruptcy, acquired the real ownerfhip by the ftatute for the benefit of their creditors? I lay out of confideration the queftion of re-entry of the plaintiff; for I do not think that it makes any difference in this cafe. This decifion will only be an authority for a cafe where the bankrupts were in poffeffion of utenfils neceffary for carrying on their trade under a leafe; and where there was no ufage of the trade for the trader to have fuch utenfils let to him on hire. Wherever fuch a ufage of trade may prevail, the cafe may deferve another confideration. I muft take it upon the facts here difclofed, that *John Horn* was the owner of the utenfils in queftion before the deed of *March* 1801; though that fact is very clumfily ftated in the cafe: the Court however confiders that by fome means or another, which do not diftinctly appear, thefe utenfils were the property of *John Horn*; and he demifed them to the bankrupts, who were to carry on the trade after he withdrew from it; and without thefe articles they could not have carried on the trade; and there is no ufage in the trade for letting fuch utenfils. The queftion then is, whether, under thefe circumftances, the bankrupts had the poffeffion, order, and difpofition of the goods by the confent of the true owner? I think they had. For though there are many exceptions, as in the cafe of factors, bankers, lodgers, and others who

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are known to have the goods of other persons in their possession; none of which, it is true, are expresly excepted in the statute; yet the ground of all the exceptions has been, that the possession of such and such descriptions of persons did not carry to the understanding of the world the reputed ownership. The same rule might extend to furniture let with a house, and perhaps even to furniture let without the house to be used there, where such lettings were usual; and by a parity of reason to utensils of trade usually let to the traders; because possession in such cases would not carry the reputed ownership of the property, and would not impose on the world a false appearance of property in the possessor.

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The verdict to be entered for the plaintiff for the value of the fixtures only, and the damage done in removing them.

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The charter of *Saltash* empowers the mayor, justice of the peace, and the rest of the aldermen (seven in all), or the major part of them, of whom the mayor and justice to be two, when it shall seem to them *convenient and necessary*, to elect as many free burgesses as shall please them, *and to the same free burgesses so elected to administer an oath*, &c. The defendant was elected a free burgess in *Oct.* 1804, and in *Dec.* 1806, at a meeting of six out of the seven aldermen, in consequence of a mandamus to them to fill up the vacant place of alderman, and which meeting the mayor *said* was held for that sole purpose, the defendant tendered himself to be sworn in; against which three aldermen protested, one of whom immediately left the assembly; but before the other two protesters withdrew, the mayor, with the assent of two other aldermen, administered the oath of office to the defendant. Held,

1. That the swearing in of the burgess might well be at a time subsequent to the election; he having had a present legal capacity to be sworn in at the time of his election; and therefore not like the case of an infant elected.

2. That the act of swearing in, being merely ministerial, may be done by the mayor, as presiding officer, in the presence of the majority of the mayor and aldermen, by whom such act was required to be done, whensoever and howsoever assembled, and without any previous summons for this purpose; there being no dissent by the majority at the time when the oath was so administered.

3. Though three, an equal number of those first assembled, *protested* against the defendant's being sworn in when he first tendered himself to take the oath, yet one of the protesters having withdrawn, it was competent to the majority who remained to administer the oath; no vote having been come to by the major part at first assembled to preclude the body from doing the act at that meeting.

4. Quære, Whether, if it be found against a defendant in quo warranto, that, though duly elected, he was not duly sworn in, there can be any other judgment against him than of ouster absolute; there being no instance of a judgment of ouster quousque.

AN information in nature of a quo warranto was filed against the defendant, calling upon him to shew by what authority he claimed to be a free burgess of the borough of *Saltash*; which stated that *Saltash* is an ancient borough, incorporated by the name of the mayor and free burgesses of the borough, &c.; that there is an indefinite number of free burgesses; and that the defendant, on the 18th of *December* 47 *Geo.* 3. used and exercised, and usurped the office of a free burgess of the borough, and still doth, &c. without any legal warrant. The defendant in his plea set forth a charter granted by his present majesty, in the 14th year of his reign, whereby he incorporated the village of *Saltash* by the name of the mayor and free burgesses of the borough of *Saltash*; and thereby granted that one of the aldermen, to be elected in the manner therein mentioned, should be the mayor; that there should be six other free burgesses *of the inhabitants* of the borough, to be elected as therein mentioned, besides the mayor for the time being; viz. seven

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capital free burgeſſes of the inhabitants of the borough in the whole, who ſhould be the aldermen and council. That the mayor of each preceding year ſhould be a juſtice of the peace until a new mayor ſhould in due manner be elected and ſworn. That it ſhould and might be lawful for the mayor and juſtice of the peace, and the reſt of the aldermen for the time being, or the major part of them, (of whom the mayor and juſtice of the peace were to be two,) from time to time, and at all times thereafter, when and ſo often as to them it ſhould ſeem *convenient and neceſſary*, to *nominate*, elect, and prefer, ſo many and ſuch perſons to be free burgeſſes as ſhould pleaſe them; and to the ſame free burgeſſes ſo elected *to adminiſter an oath* faithfully to execute all things which in the place of a free burgeſs belonged to be done; and this without any commiſſion or further warrant to be obtained from the king, &c. The plea then ſtated the acceptance of the charter: and that afterwards, on the 1ſt of *October* 1804, *John Buller* Eſq. then being mayor, *John Cleveland* Eſq. juſtice of the peace, and *R. Hickes*, *R. Thomas*, *James Buller*, and *J. Gaborian* Eſqs. aldermen, aſſembled at the *Guildhall* of the borough to nominate and elect free burgeſſes, did nominate and elect the defendant a burgeſs; and that being ſo elected the defendant afterwards, and before his uſer or claim of the ſaid office, on the 18th of *December* 1806, at the *Guildhall*, before the *ſaid James Buller*, then being mayor, the *ſaid John Buller*, then being juſtice of peace, and *S. Drew* Eſq. and the *ſaid R. Hickes*, *J. Cleveland*, and *J. Gaborian*, then being aldermen of the borough, was *duly ſworn* into the ſaid office of a free burgeſs, and took the oaths preſcribed by the charter; by virtue whereof the defendant claimed to be a free burgeſs of the borough.

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The replication took issue on several facts stated in the plea; 1st, that the said *John Buller*, *J. Cleveland*, *R. Hickes*, *R. Thomas*, *James Buller* (the alderman), and *J. Gaborian*, did not *duly assemble to nominate and elect free burgesses* in manner and form as pleaded. 2dly, That they did not nominate and elect the defendant into the office of a free burgess, in manner and form, &c. 3dly, That the defendant was not *duly sworn* into the said office in manner and form, &c. 4thly, That the mayor, and justice of the peace, and the rest of the aldermen for the time being, or the major part of them, (the mayor and justice of the peace being two) did not administer such oath to the defendant, nor was the defendant sworn, as by the charter is required. On all which facts issues were joined.

At the trial at *Bodmin* the first and second issues, upon the due assembling of the mayor, justice, and aldermen for the election of the defendant as a free burgess, and the fact of his election by the same persons in manner and form as alleged in his plea, were found for him.

As to the 3d and 4th issues, upon the fact and the regularity of the defendant's having been *sworn* into the office of a free burgess, the jury found a special verdict to the following effect: That on the 18th of *December* 1806, the place of one of the aldermen being vacant, *James Buller*, the mayor, *John Buller*, the justice of peace, *R. Hickes*, *J. Cleveland*, *S. Drew*, and *J. Gaborian*, aldermen of the borough, (being the two quorum officers and six out of the seven aldermen,) and divers free burgesses, were assembled in the *Guildhall* of the borough, on due notice, in obedience to a writ of mandamus issued out of *B. R.* commanding them to proceed to the election and swearing in of an alderman of

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the borough, in the room of *R. Thomas*, deceafed. That at fuch meeting the defendant came and offered himfelf to be fworn into the office of a free burgefs, and to take the ufual oaths; grounding fuch claim on his election thereto of the 1ft of *October* 1804; the mayor having before that time *faid* that the meeting was for the fole purpofe of electing an alderman. That *R. Hicks, S. Drew*, and *J. Gaborian*, (three of the aldermen,) on the defendant's fo offering himfelf to be fworn in, *protefted* againft his being fworn in, and againft doing *any thing* at that meeting *except* electing and fwearing in an alderman; for which, as they alleged, the meeting was held; and delivered to the mayor a written proteftation as follows—"we hereby proteft againft every proceeding of "the Court this day unconnected with the election of "an alderman. 18*th December* 1805. (figned) *R. Hicks*, "*J. Gaborian, S. Drew*," (together with the names of 16 free burghers, and directed) "To the mayor of *Saltafh*, "the juftice, the aldermen, and free burgeffes of the faid "borough." That the three aldermen, *R. Hicks, S. Drew*, and *J. Gaborian*, then rofe to leave the room; but the mayor proceeded to adminifter to the defendant the oaths ufed and required at the fwearing in of a perfon duly elected into the office of a free burgefs; *which oaths were fo adminiftered to the defendant after* R. Hicks (one of the three protefting aldermen) *had withdrawn, and before* S. Drew *and* J. Gaborian (the two other protefting aldermen) *left the room; which they did immediately afterwards*. But whether the defendant were under thofe circumftances duly fworn into the faid office of a free burgefs, as alleged by him in his plea; or whether the mayor, juftice of peace, and the reft of the aldermen, or the major part of them (the mayor and juftice being two)

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did adminifter fuch oath to the defendant, and the defendant were fworn, as by the charter is required, and by the plea is fuppofed, the jury prayed the advice of the Court in point of law.

This cafe was argued in the laft term, when

Adam jun. for the profecutor contended that the defendant was not duly fworn into the office of a free burgefs on three grounds; 1. becaufe the fwearing in was not at the fame time as the election. 2. Becaufe the defendant was fworn in at a corporate meeting fummoned for a different fpecific purpofe, and there was not the confent of the whole body to the act at the time, fo as to cure the defect of fummons for this purpofe. 3. Becaufe he was not fworn in by the mayor, juftice of peace, and the reft of the aldermen, or the *major part* of them. Firft, The election and fwearing in muft be fimul et femel. This was fo confidered in the *King* v. *Carter* (*a*), where the words of the charter of *Portfmouth* were in fubftance the fame as in this cafe. [Lord *Ellenborough* C. J. The queftion in judgment there was, whether the corporation could elect an *infant* into an office who was *incapable* of taking it at the time.] Some of the Judges, particularly *Afton* J., went upon the ground that by the true conftruction of the charter the fwearing in was intended to be done at the fame time as the election, as if it were one continuing act. And the fame intention is to be collected from the direction in this charter to elect free burgeffes when it fhould feem "*convenient and neceffary*" to the corporation. For if at any time it is *neceffary* to elect, it muft be equally neceffary

(*a*) *Cowp.* 220—7.

that

that the perſons elected ſhould immediately take upon themſelves the office and be ſworn in; otherwiſe the ſwearing in at a future time will not be ſuch as will ſupply the neceſſity: and the corporation are accordingly directed in the ſame ſentence to adminiſter the oath to the burgeſſes ſo elected, without adding when it ſhall be convenient; the charter contemplating that the power of filling the office ſhould be completely executed at one and the ſame time. The general convenience of the thing is alſo in favour of this conſtruction; for if the ſwearing in be left to any future time at the pleaſure of the perſons elected, the corporation, having no means of compelling them to come in and be ſworn, might be diſſolved in the mean time for want of ſufficient numbers: and at a great diſtance of time doubts might ariſe as to the identity of the perſons ſo nominated. 2dly, The corporation having been aſſembled for the ſpecific purpoſe of electing an alderman, and which was declared by the mayor to be the ſole purpoſe of their meeting, could not do any other act unconnected with that purpoſe, without the concurrence of the whole body. For which he cited *Machell* v. *Nevinſon* (*a*), *Rex* v. *Wake* (*b*), *Rex* v. *Carliſle* (*c*), and *Rex* v. *Theodorick* (*d*): and in anſwer to an obſervation from the Bench, that theſe were caſes of elections; he argued that there was a diſtinction in principle between proceeding to an election, and to a ſwearing in, where the corporation was ſummoned for another diſtinct purpoſe. And the objection, he ſaid, applied with peculiar force to a corporate meeting aſſembled to do a ſpecific act in obedience to a writ of mandamus, where the ſwearing in of the defendant interrupted the proceeding which

(*a*) 2 *Ld. Raym.* 1355.
(*b*) 1 *Barnard.* 80.
(*c*) 1 *Stra.* 385. and vide 8 *Eaſt*, 544.
(*d*) 8 *Eaſt*, 543.

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it was the duty of the affembly to difpatch, and thereby endangered its continuance. 3dly, And principally, he objected, that the defendant was not fworn in before the mayor, juftice and aldermen, or the major part of them, as required by the charter, being the fame body who have power to elect. The confent of the body by whom the fwearing in is required to be is neceffary to its validity; and therefore in *Rex* v. *Ellis* (*a*), the fwearing in was held

(*a*) 2 *Stra.* 994. The following Report of this cafe, from Mr. *Ford*'s Notes, is more full than that in *Strange.*

REX *v.* ELLIS, *M.* 8 *G.* 2. *B. R.*—Quo warranto to try his right to be mayor of *New Romney*; one iffue fent to trial was, if duly *elected*; this was found for the defendant. Another was, if duly *fworn*; and this was found for the king. And the defendant moved for a new trial upon a fuppofition, that *Eyre* C. J., who tried the caufe, had given a wrong direction to the jury. The evidence was, that after the election Mr. *Ellis* came to be fworn, but the old mayor refufed him: however, in the prefence of the mayor, who ftill diffented, the town clerk, the ufual officer to adminifter the oath, gave the book to the defendant, who repeated the oath after him: and the charter requiring the new mayor to be fworn *before* the old one, the queftion was, if this were not a good fwearing in within the charter?

Strange urged that the charter was, "*before*" and not "*by* the mayor:" fo that the fwearing in agreed with the words of the charter; and, as this fact is, was alfo agreeable to the intent of it: for the defendant being fairly elected, the crown could never defign to enable the perfon who is to adminifter the oath of office to exclude him: but as the election is the foundation of the party's right, whenever that is indifputable, the mayor ought to fwear in the party elected; and confequently, upon refufal to do his duty, the mayor elect, if he can procure himfelf to be fworn within the words of the charter, is fairly and legally fworn. And it was urged that, if the Court fhould be of another opinion, mayors or other officers who are ill-difpofed will for the future meet with encouragement to tranfgrefs their duty in this point: when it comes to be known that the officer has it in his power to reject or to admit the party elected, there will be people enough ready to engage in a piece of dirty work.

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held to be bad, becaufe the mayor before whom it was to be done, though prefent, was not affenting: and it was there faid that there was no difference between a fwearing in *by* and *before* the mayor. The fame objection prevailed in the cafe of the Duke of *Bedford* (*a*), to whom the oath of office of governor of the *Bedford* Level was adminifter-ed by the regiftrar, in the prefence indeed of the fix bailiffs by whom it was required to be adminiftered, but not by their confent; for they endeavoured to go away, but the door of the room was fhut on them, and they were com-pelled to remain while the Duke was fo fworn in. Now, though it be fufficient if a majority of each integral part affemble, and a majority of thofe fo affembled confent to the fwearing in; yet here was no fuch confenting majo-rity; for out of the fix aldermen affembled three were not confenting to the act: and thefe were only prefent

Lord HARDWICKE C. J. The title to every office is grounded on two things; the election of the party, and his being fworn into the office: there is no difference in the world between a fwearing in *by* and *before* the mayor: in either cafe the mayor is equally entrufted with the fwearing in of his fucceffor; and if he deny to fwear him in, though ever fo fairly elected, he cannot have any right to his office. The adminiftration of the oath by the town clerk againft the commands of the mayor was as void an act, as if, in cafe this court were the proper place to adminifter the oath in, one of our officers had wilfully given the oath againft the order of the Court: it is the confent of the Court that eftablifhes or makes void the act of fwearing. As to the encouragement this opinion may give to prefiding officers, I apprehend it can be of no effect; they all know that they are ftill fubject to the power of this Court, which will by mandamus compel an execution of their duty. The defendant fhould have brought his mandamus, and not have relied on fuch a fwearing in; and then he might have been legally fworn in. As it is, the direction was right, and the iffue is well found: fo there is no rea-fon for a new trial; with which the other Judges agreed. So it was denied.

(*a*) 1 *Barnard.* 242, 280.

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by the compulsion of the mandamus for another purpose, and protested against the defendant's being sworn in. But it may said, that after one of the three had withdrawn, there was a competent meeting of five out of the seven aldermen, of which three, the major part of the five, were competent to consent to the act. But when the defendant offered himself to be sworn in, all the six were present; and then the proposal was in effect negatived; and the act was only done after all the three protesting members had risen to go out of the room, though in fact, before two of them had actually quitted it: but the whole must be taken together, as done uno flatu; and then either there was not a majority of those present consenting, or there was not a majority of the integral part in effect present when the oath was administered, but it was done by surprize and fraudulently; and especially as no previous notice had been given of a meeting for this purpose.

Another point was made in argument, upon which however no judgment was given; whether, supposing the swearing in of the defendant to have been invalid, there should be judgment against him of ouster *absolutely*, or only *quousque* he should be legally sworn in. And *Adam* contended, that the judgment should be of ouster absolute; and this as well upon the words of the stat. 9 *Anne c.* 20. *s.* 5. which says, that the Court shall proceed as well to give judgment of ouster against, as to *fine*, any person found guilty of usurping an office; and wherever there is judgment to fine, there must be judgment of ouster absolute: as also upon the want of any precedent or authority for entering up a judgment *quousque* in such a case, where a defendant has set up a title to an office, which has been found against him. And he referred to *Rex* v.

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The Mayor of Penryn (*a*), and *Rex* v. *Hearle* (*b*); and observed, that though *Reynolds* J. so far differed from the rest of the Court in *Hearle*'s case as to consider it no new thing to meet with instances of judgments quousque; yet it was plain, that he must have confounded judgments of *seizure* quousque, which were frequent enough, with judgments of *ouster* quousque, of which none of the other judges had ever heard. And he must have been afterwards satisfied of his mistake; for in *Rex* v. *Reek* (*c*), upon a trial at bar before the same judge as one of the Court, it having been found on the 4th issue, that the defendant was not sworn and admitted into the office of burgess; the Court agreed, that though the other issues were found for him, yet there must be judgment of ouster on the authority of the *King* v. *Pinder*, mayor of *Penryn*. And that is in point; for though the issue on his due election to the office was found for him, yet the second issue on the swearing in being found against him, judgment of ouster absolute was pronounced, which was affirmed by the House of Lords. He also observed, that there was no precedent of a judgment of ouster quousque in the records of the Crown Office; and that such a judgment would be wholly inoperative; for it would only suspend the party from the exercise of his function, which the law, without any such judgment, would do, until he chose to come in and be sworn; but still the corporation could not compel him to be sworn, nor elect any body else into his office, as if vacant.

Dampier, contrà, in answer to the first objection to the defendant's title, that the election and swearing in of the defendant were not *simul et semel*, founded on what was

(*a*) 1 *Stra.* 582. (*b*) *Ib.* 625.

(*c*) 2 *Ld. Ray.* 1447. Vide 2 *Stra.* 952. *Rex* v. *Buddle and Taylor.*

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said by *Aston* J. in *Rex* v. *Carter* (*a*), distinguished this case, where the person elected had a present capacity of being sworn in, and of perfecting his title at the time, from that, where the election was of an infant only five years old, who was then incapable of being sworn in and of executing the office. And it was there admitted by Lord *Mansfield*, that absentees, who of course could not be immediately sworn in, might be elected. Such a construction would in effect confine the choice of *burgesses* to the *inhabitants* of the borough; which the charter has not done; though the choice of magistrates is so confined. As to the second objection, that the corporate meeting having been called for another purpose, the consent of the whole body was necessary to legalize the swearing in; this rule has only been applied to acts of judgment and discretion, and not to mere ministerial acts, such as the swearing in of one before elected, which this Court would compel to be done by mandamus absolute in the first instance. The declaration of the mayor that the meeting was only for the purpose of electing an alderman, would not invalidate the swearing in, if the defendant had a right to require it. As to the third objection, that the majority of the body before whom the oath is to be administered did not assent to the swearing in; supposing such assent to be necessary where the act is merely ministerial, and may be performed any where within the borough, and was performed by the principal officer present, who was the proper person to administer the oath; at any rate, the Court would require the most express and formal dissent, where it was the obvious duty of those present to do the act, and which this Court would have compelled them to do. Now the protest of the three aldermen was against all acts unconnected with the

(*a*) Cowp. 227.

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election of an alderman: (The Court obferved, that it did not appear whether the fwearing in of the defendant were unconnected with fuch election.) Even if it were, the effect of the proteft could only operate while the protefting parties remained; and when one of them (*Hicks*) went away before the meeting broke up, he could not leave his vote behind him. His proteft was only a fignification of what he meant to do, namely, to vote againft the fwearing in of the defendant whenever it was propofed to be done; but which he went away without doing. To make his oppofition effectual he fhould have ftaved and voted againft the act; for, on his retiring, three became a majority of the five who remained. In *Oldknow* v. *Wainwright* (*a*), and *Rex* v. *Withers* there cited (*b*), elections of officers by the minority of thofe prefent; the majority not voting againft the candidates nominated, nor for any other candidates, but only protefting againft any election; were held good. If the fwearing in were a deliberate act, *Hicks* ought to have ftayed and affigned his reafons againft it; in order if right, to convince his brethren; or to have been convinced by them, if wrong: the reft might have fatisfied him that it was a mere minifterial act, and that he was bound to complete the title which he had helped to confer.

Upon the form of the judgment to be entered, if againft the defendant, whether of oufter abfolute, or quoufque; he faid that the cafes cited againft the latter were of *annual* officers: but where a right to the freedom of a corporation may be gained by election, by birth, or apprenticefhip, it feems ftrange and unjuft to fay, that becaufe the party happened unwarily to be fworn in at a meeting improperly convened or conftituted, he fhould

(*a*) 2 *Burr.* 1017. (*b*) *Ib.* 1020.

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lose his former privilege for ever, if afterwards ouster by quo warranto. All the cases were considered in *Rex* v. *Clarke* (*a*), who, having been ill sworn in, had afterwards disclaimed upon an information filed against him for usurping the office: and though having submitted to a judgment of complete ouster, he was held to be concluded from setting up again his original right; yet Lord *Kenyon* intimated that there might have been a judgment quousque only against him; and referred to *Rex* v. *Biddle* (*b*), as turning on that distinction. He admitted, however, that the latter case did not come up to the point for which it was referred to in *Clarke*'s case; for in *Biddle*'s case the defendant only confessed the usurpation of the office for the former part of the time stated in the information.

Adam in reply, as to the last point, observed, that there could not have been judgment of ouster in *Biddle*'s case; because it appeared on the whole record, that at the time of the judgment to be pronounced, he had a good title to the office. That *Reek*'s case was not that of an annual officer. And that the opinion thrown out by Lord *Kenyon*, in *Rex* v. *Clarke*, was extrajudicial. Upon the first point, he said, that the reasoning of the judges in *Carter*'s case was general, and not confined to the case of infants. As to the second, that the swearing in here was part of the election, and no more ministerial than the nomination. That acts might intervene which would justify the body in refusing to swear in the party nominated to the office by a majority of votes. As to the third and principal point; that the protest was against the very act of swearing in the defendant, and therefore operated as a direct negative of that act, and not like a general

(*a*) 2 *East*, 75. 84. (*b*) 2 *Stra.* 952.

protest

protest against the acts of the assembly, or against any election at the time required by the charter. The case stood over till this term, when

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Lord ELLENBOROUGH C. J. delivered the judgment of the Court. After stating the pleadings and special verdict. The only question arising upon this special verdict for our consideration is, Whether, under the circumstances stated, the defendant were duly *sworn* into the office of a free burgess: the validity of his *election* as a free burgess is not disputed. The facts, stripped of form are these: the defendant was elected a free burgess on the 1st of *October* 1804: from that time to the 18th *December* 1806 he does not appear to have offered himself to be sworn in. On that day, when the mayor, justice, and aldermen, being the two quorum officers, and six out of the seven aldermen, were assembled, in obedience to a mandamus of this Court, to elect an alderman, in the place of one who was dead; the mayor having before that time *said*, that the meeting was for the sole purpose of electing an alderman; (but when, and to whom, and whether to any of the aldermen or not, he had so said; and whether at or before the time of such their assembling any of the aldermen knew him to have so said; or whether, after having so said, he might not have declared to the contrary; does not appear:) but the mayor having, at some time before the meeting, said to somebody, that the meeting was for the sole purpose of doing the corporate act required by the mandamus to be done: all the existing aldermen being assembled, and the whole of the body under the charter; except the only one whose vacancy was then to be filled up: upon the defendant's offering himself to be sworn in, three aldermen, out of the six present,

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fent, *protefted* againft the doing any thing at that meeting, except the bufinefs required by the mandamus: whereupon, after one of the three had withdrawn, and before the other two had withdrawn, and whilft five out of feven, (the whole body) and five, out of the exifting number of fix, who had all met, and ftill continued together, (though two were in the act of departing,) he was fworn in, fuch *previous proteft* of three of the fix notwithftanding. It cannot be difputed but that the number and defcription of perfons affembled were competent to have fworn in the defendant, if they had chofen fo to do; and it is equally clear, (unlefs there be fome foundation in law for the firft of the points made in argument, on the part of the profecution; viz. that the fwearing in muft be immediately confequent upon the election, or *fimul* and *femel*, as it was contended it fhould be;) that this Court would, upon their refufal to fwear him in, have by mandamus compelled precifely the fame body as was then affembled to have met again for the very purpofe of fwearing him in, and of thereby rendering him a complete burgefs. The points made in argument, on the part of the profecutor of this information, and upon which the defendant's title as a free burgefs was endeavoured to be impeached, were three: firft, the one juft alluded to; viz. that his fwearing in and election did not take place at the fame time, or rather the one immediately after the other: fecondly, that the defendant could not be duly fworn in at a meeting of the mayor and aldermen *called for a different purpofe*: and, thirdly, that he was not fworn in, as the charter required, by the mayor, juftice, and aldermen, or the major part of them.

As to the firft objection to the defendant's title, that he was fworn in at a time different from that of his election;

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tion; it is rested on what was said by *Aston* Justice in the case of *The King* v. *Carter*, *Cowp*. 220. viz. that "in "respect of the oath, the *election* and *swearing in* are "clearly intended to be *simul* and *semel*." That was the case of an election to the office of burgess in the borough of *Portsmouth*, under a charter authorising the mayor and aldermen, "when and as often as it should appear to them "to be fit and necessary, to name so many and such persons "to be burgesses as they should please; and to the said "burgesses so chosen, to administer an oath for their "faithfully executing the said office of burgess." It appeared by the pleadings on record that the defendant, when an infant under six years of age, had been elected a burgess, and sworn in after he had attained his age of 21. And the question was, Whether an infant, so elected, were duly elected according to the terms of the charter? which turned upon this, whether the king had by that charter given the corporation a power to grant inchoate rights to *infants*, who were, as such, under *a present incapacity* of being sworn, and which rights were to be put into execution upon their attaining the age of 21. So far from maintaining the necessity of an immediate swearing in, Lord *Mansfield* adverts to the *Cambridge* case, lately decided in that court, in which a person absent in *America* had been chosen mayor: and Lord *Mansfield* recognizes the right of a corporation to choose absent members, if it be done fairly and consistently with the charter, and not fraudulently and collusively, as was done in the *Cambridge* case. According to Lord *Mansfield*, therefore, a person *capable of being sworn*, if present, may be elected, if absent, (and where, on that account, a swearing in could not immediately take place,) if he were in other respects eligible. Lord *Mansfield* therefore

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fore clearly holds that a capable perfon may be well elected, though his fwearing in fhould not be immediately confequent upon his election. *Afhburft* Juftice fays, "the perfons intended" by the charter are "fuch as are "*capable* of taking upon themfelves the *immediate execu-* "*tion* of the office; not perfons to be nominated only, "and who might or might not act, or be capable of "acting in future, as circumftances and events might "turn out." And the opinion of Mr. Juftice *Afton*, though it is conceived in terms of fomewhat greater generality, yet if confidered with reference to the cafe then before the Court, is to the fame effect: of which cafe he fays, that it was "not an election, but a contingent no-"mination, which perhaps might never have taken ef-"fect; becaufe the party might not have lived: other "perfons might at fuch a diftance as ten years be to "fwear him in: difputes might arife as to his being *the* "*fame perfon*," &c. All of which fhews that his objection was founded upon a *prefent* incapacity of completing the election by a fwearing in, and did not apply to the cafe of a mere omiffion to complete the election of a prefently capable perfon by an immediate fwearing in. The only authority, therefore, which has been cited, as fuppofed to be in favour of the firft objection, viz. that the fwearing in was not immediately confequent upon the election, not being found upon examination competent to fupport it; and as the effect of admitting fuch an objection in this cafe would be to exclude, upon the fame principle, all abfent and otherwife capable perfons, as objects of election to corporate offices; for which in practice and reafon there feems to be no foundation; we are of opinion that the validity of the defendant's title as a free burgefs is not impeachable on this ground. The neglect to be

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ſworn in for a great length of time, as above twenty years after election, might (as in the caſe of *The King* v. *Jordan, Rep. temp. Ld. Hardw.* 255. (*a*)) be deemed a waver or refuſal to accept the election by the party elected; but does not vitiate the election itſelf; for otherwiſe the queſtion of waver could not have ariſen in that caſe.

As to the ſecond objection, that the defendant could not be ſworn in at a meeting of the mayor and aldermen called for a different purpoſe: without repeating what has been already obſerved, as to the inſufficiency of the finding of the ſpecial verdict in this particular; which is only,

(*a*) In that caſe the defendant was not ſworn into the office of capital burgeſs till about 25 years after his election, and another capital burgeſs had in the mean time been elected. According to Mr. *Ford*'s note of this part of the judgment, Lord *Hardwicke* ſaid: "As to the general queſtion which is put, Whether, if a perſon elected into an office neglect to be ſworn into it for a number of years, ſuch an omiſſion is to be conſidered as a renunciation of his election? Suppoſe after a long time the office was filled up, ſhould we grant a peremptory mandamus to ſwear in ſuch an one? Certainly not. By the election the party has neither jus ad rem nor in re: and this is plain, for he has no legal action to procure himſelf to be ſworn in. By a mandamus indeed theſe queſtions are uſually tried; but a mandamus is no action, but only an exerciſe of the authority of this Court over inferior juriſdictions, by which it obliges them to do juſtice. If it appeared that a perſon was elected into an office, and his election being ſignified to him, he ſhould anſwer that he would not have the office; and thereupon the electors ſhould chooſe another; this would be an expreſs refuſal of his election; and this Court would never enforce it. And I think the defendant's acquieſcence in the preſent caſe is as direct a refuſal. If he had been beyond ſea, or under any incapacity of taking the office in a reaſonable time, that ought to have been ſhewn: but here he is quite ſilent; totally without excuſe: and that inchoate, imperfect right, which he gained by the election, is abſolutely waved. His acquieſcence and neglect to be ſworn is a plain evidence that the perſon elected was unwilling to take the office, and that the body was conſenting to accept his renunciation. So I think judgment ought to be given for the king." And it was given accordingly by the unanimous opinion of the other Judges.

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only, "that the mayor had before that time *said* that the "meeting was for the sole purpose of electing an alder- "man:" and supposing it to have been distinctly alleged, that the meeting was in fact called, and had assembled, for that special purpose only; yet even so, it appears to us that, however true this proposition may be as applied to corporate business of a deliberative or judicial nature, the *merely ministerial* business of swearing in an officer, antecedently well elected, might be proceeded upon by the mayor, in the presence of the majority of the mayor and aldermen, *whensoever, and howsoever assembled*; if such majority did not, at the very time, expresly dissent from the doing of that act which the mayor was immediately engaged in performing. Giving the fullest effect to the antecedent protest of the three aldermen, it could amount to no more than a dissent on their part to the swearing in at that precise time when the defendant was actually offering himself to be sworn in; or at most to his being sworn in during such time as they continued to make a part of that assembly; but it could not prevent the majority of a competent number remaining assembled from afterwards, at any time, doing or assenting to the ministerial act protested against, in respect of the same person, if they chose so to do. And the subsequent doing that act by the mayor, (when the aldermen and majority of the whole body, when the quorum officers, as a part thereof, were present, without any actual dissent being expressed by any,) must be taken to have been done with the tacit assent at least of the majority of those who remained and had not objected. On this occasion no question was submitted to the assembly, which, having been considered and voted on, can be treated as having bound and concluded those who had assembled from

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ſwearing in the defendant till ſome future time: and we have only to conſider what is the effect of three members of this aſſembly wrongfully, as far as appears in this ſpecial verdict, objecting to the defendant's being ſworn into his office, though legally entitled, and afterwards quitting the aſſembly, with ſuch interval of time as to leave a competent number to aſſent to the mayor's act of ſwearing in the defendant. Had they all remained with the others ſo long as they continued aſſembled; or had they all gone away before the oath was adminiſtered; the wrong they intended might have been effected: but it is not to be expected that the Court ſhould not prevent, if it be poſſible, the defendant from being deprived of a franchiſe to which he was legally entitled, by a practice contrary to the duty of thoſe who were concerned in it. This is ſaid upon a ſuppoſition that ſuch aſſent was ſtrictly neceſſary; and that what is laid down in *The King* v. *Ellis*, 2 *Stra.* 994. is law, *i. e.* that a ſwearing *before*, &c. is the ſame as a ſwearing *by*, &c.; and that as it was to be the act (in that caſe, of the mayor,) in this caſe, of the mayor and aldermen; that *the aſſent of the party before whom*, &c. *muſt go along with it*; which, in reſpect to an aggregate body having no deliberative or judicial function to perform on the ſubject, nor, as far as appears, any thing more to do upon the occaſion, than for a majority of them to afford their perſonal attendance, may admit of ſome queſtion; unleſs indeed that caſe is to be underſtood as being concluſive on the point.

The third objection (the diſcuſſion of which has been in part anticipated by what has been ſaid, as to the effect of the aſſent of the body called for a different purpoſe,) is, that he was not ſworn in *by the mayor, juſtice, and aldermen, or the major part of them.* And the caſe of *The*

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King v. *The Duke of Bedford and Others*, 1 *Barnard*. 280. has been principally relied upon in support of this objection. But the facts of that case are widely different from those of the present. In that case, the statute required that the six bailiffs, or one of them, *should administer* the oath to the governor after he was elected; instead of which the oath was administered by none of them to the duke, as governor, but by the registrar, in the presence of the six who had been shut into the room after an ineffectual attempt on their part to escape from it: and not only without any consent or authority on the part of *any* of them to the administration of the oath by the registrar, but at a time when their mere presence, during the time of swearing, was enforced by an act of immediate duress upon their persons. In the case now before the Court, the oath was administered by the presiding member of a competent assembly for the purpose; in which act the majority of those who remained, being a sufficient number to make such assembly, virtually acquiesced; according to what was said by Lord *Mansfield* in *Oldknow* v. *Wainwright*, 2 *Burr*. 1021.; as no dissent was expressed by any; and the act being such an one as, if not done, this Court would have presently afterwards, upon application for the purpose, by mandamus, have compelled them to re-assemble for the purpose of performing, and to have performed accordingly. We are of opinion therefore that the swearing in of the defendant, under the circumstances stated, was a due swearing in of the defendant as a free burgess by the mayor, justice, and major part of the aldermen, as alleged in his plea, and as required by the charter.

The Court being of opinion that the defendant was well elected and sworn in; the remaining question made

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in argument, as to the nature of the judgment which it would have been proper for us to have given if we had been of a different opinion; namely, whether it should have been a judgment of absolute ouster, or of ouster quousque, does not arise. If it had arisen, it is enough for us to say, that after diligent search, we can find no precedent of a judgment of ouster quousque upon the files of this Court.

Judgment for the Defendant.

RIGHT, on the Demise of JOHN ALLEN COMPTON and Others, *against* THOMAS COMPTON.

Monday, Feb. 1st.

Where there is no connexion by grammatical construction or direct words of reference, or by the declaration of some common purpose, between distinct devises in a will, the special terms of one devise cannot be drawn in aid of the construction of another, although in its general terms and import similar, and applicable to persons standing in the same degree of relationship to the testator; and there being no apparent reason, other than the different wording of the clauses, to presume that the testator had a different purpose in view.

Therefore, where the testator having a son married, and six grandsons and three grand-daughters, and three farms, devised *all* his lands to his son *for life*; and after his death gave to his eldest grandson *Thomas* (the defendant) the *north side* of *Down Farm*, and to his grand-daughter *Frances* the *south side* of the same farm: and to his grandsons *George* and *Edmund*, and his grand-daughter *Elizabeth*, "the *upper part* of *Lain Farm*, equally between them, so long as they should remain single; but if either married, then to have *paid by the other two* 10*l.* a-year for his or her life;" and to his grandsons *Edward* and *John*, and his grand-daughters *Mary* and *Ann*, "the *lower part* of *Lain Farm*, equally between them (which made them tenants in common) so long as they remained single; but if either married, then 10*l.* *a-year* (not saying to be *paid by the others*) for his or her life:" and then gave the third farm to another grandson: held that on the marriage of *Edward*, *Mary*, and *Ann*, their co-devisee of the lower part of the *Lain Farm*, *John*, who remained single, could not recover the 3-4ths of the farm forfeited by their marriage, as upon the supposition that the 10*l.* a year for life to each of the devisees so marrying was to be paid *by him* who remained single; as in the corresponding devise of the other part of the *Lain Farm*: but the 3-4ths may be chargeable with the annuities of 10*l.* a-year to each in the hands of the heir at law, who was entitled to those shares.

Neither could the grandchildren take a fee by implication in the shares so devised to them generally, without words of limitation, merely from the circumstance that an express estate *for life* was first given to the testator's son and heir at law.

THIS was an ejectment for a farm and lands called the *Lower part* of the *Lain Farm*, in the parish of *Amport* in the county of *Hants*, on the demise of *John Allen Compton* on the 27th of *March* 1806. The defendant, *Thomas Compton*, defended only for three-fourths of the premises: and the lessor of the plaintiff having

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taken judgment for the other fourth against the casual ejector, the cause was tried as to the three-fourths before *Chambre* J. at the spring assizes 1807, at *Winchester*, when a verdict was found for the plaintiff, subject to the opinion of the Court on this case. *Thomas Compton* the grandfather of the defendant, being seised in fee of the premises, and of several other farms and lands in *Amport* on the 9th of *May* 1806, by his will devised as follows. "I give unto my son *Thomas Compton*, all my lands for his life. I give unto my grandson *Thomas Compton*, after the death of his father; all the north side of my *Down Farm*, being about 250 acres. I give unto my grand-daughter *Frances*, the wife of *John Weeks*, all the south part, being about 240 acres after the death of her father. I give unto my grandsons *George* and *Edmund*, and my grand-daughter *Elizabeth*, *the upper part* of the *Lain Farm*, being about 200 acres, after the death of their father, *equally* between, *as long as they shall remain single*; but if *either* of them *marry*, *then to have paid by the other two* 10*l.* *a-year for his or her life*. I give *Edward* and *John* and my grand-daughters *Mary* and *Ann*, all that *lower part* of the *Lain farm*, being about 240 acres, after the death of their father, *equally* between, *as long as they shall live single*; but if *either* of them marry, *then* 10*l.* *a-year for his or her life*. I give unto my son's wife, if (she) should outlive him 5*l.* *a-year out of each of the farms during her life*; and also the interest of 700*l.* *East India* stock of three per cent. annuities, and at her death to be equally divided among her children. I give unto my daughter *Mary*, the wife of *George Jennings*, the interest of 1400*l.* in the three per cent. *East India* stock; and at her death the money to be divided equally between her son *George* and her daughter *Patty*. I give unto my grandson *Harry*, after his father, the farm called *Old Lodge*. I do make my son executor."

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The teſtator died in 1791: all the deviſees ſurvived him, as did *Frances* the wife of *Thomas Compton* the ſon. *John Allen Compton*, the leſſor of the plaintiff, is the perſon called in the will *John*. *Thomas Compton*, the ſon, after his father's deceaſe, entered into the ſeveral lands deviſed to him, and was poſſeſſed thereof till his death in 1795. *Frances Compton*, his wife, ſurvived him; and ſo did her children, *Thomas Compton*, the defendant, *George*, *Edmund*, *Edward*, and *John Allen*, the leſſor of the plaintiff. *Elizabeth*, *Mary*, and *Ann*, are ſtill alive. *Thomas Compton* the defendant, who is the heir at law of the teſtator, and of *Thomas Compton* the ſon, took poſſeſſion of the premiſes in queſtion, on the death of his father, and ſtill holds them. *Frances Compton*, the widow of *Thomas* the ſon, is ſtill alive, and has been regularly paid the annuities given to her by the will, ſince her huſband's death. *Edward*, *Mary*, and *Ann*, all married before the day of the demiſe in the declaration. *J. A. Compton* is ſtill ſingle. The queſtion was Whether *J. A. Compton* took any and what eſtate in the three-fourths of the *lower part* of *Lain* farm, upon the marriage of his brother *Edward* and his ſiſters *Mary* and *Ann*? and if the plaintiff were entitled to recover the three-fourths, or any part thereof, the verdict was to ſtand; if not, a nonſuit was to be entered.

This caſe was argued in *Michaelmas* term laſt by *Dampier* for the plaintiff, who mentioned *Andrews* v. *Southouſe*, 5 *Term Rep.* 292. as being moſt like the preſent caſe: and by *Bell* for the defendant, who referred to *Doe* v. *Child*, 1 *New Rep.* 345. where Lord C. J. *Mansfield* mentioned as the reſult of all the caſes, that an heir at law was not to be diſinherited unleſs by words of limitation, or by expreſſions which directly or by inference beyond all doubt ſhew an intention to give an eſtate in fee to the deviſee.

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Lord Ellenborough C. J. now delivered the opinion of the Court.

The queſtion in this caſe depends on the conſtruction of a very ill drawn will, from which if it be in the power of the Court to collect the intent of the teſtator, without any rational ground of doubt, it will be its duty to give it effect; but on the contrary, if the Court can only form conjectures of his intent, the title of the heir at law muſt prevail. From what is ſtated in this caſe it appears, that the teſtator, *Thomas Compton*, who was the grandfather of the defendant, having, at the time he made his will, a ſon living, who was married to a woman, who has ſurvived him; and being ſeiſed of three farms, one called the *Down farm*, another called the *Lain farm*, the third called the *Old Lodge*; and being poſſeſſed of conſiderable perſonal property in the funds; and having ſix grandſons, and three grand-daughters; deviſed to his ſon all his lands expreſsly for his life, and made him his executor. And after the death of his ſon he divided his lands among his grand-children in the following manner; that is to ſay, to his grandſon *Thomas*, the defendant, who, on the death of his ſon, became his heir at law, he gave the *north ſide* of his *Down farm*, without uſing any words of limitation; the *ſouth ſide* of the *ſame farm*, he gave in like manner to his grand-daughter *Frances Weeks*; the diviſion ſo made being nearly an equal one. To his grandſons *George*, and *Edmund*, and to his grand-daughter *Elizabeth*, he gave the *upper part* of his *Lain farm*, equally between them, *ſo long* as they ſhould remain *ſingle*; but if either of them *marry*, then to have paid them by the other two 10*l.* a-year during his or her life. He then gave "to his two grandſons *Edward* and *John*, and his "grand-daughters *Mary* and *Ann*, the *lower part* of the

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"*Lain farm* equally between them, *so long* as they should "remain *single*; but if either of them marry, then 10*l.* "a-year for his or her life:" and to his son's wife, in case she should outlive him, 5*l.* a-year out of each of the *farms* during her life. And after making some pecuniary bequests, he gave to his grandson *Henry*, after the death of his father, the farm called the *Old Lodge*. The case then states the death of the devisor, without altering his will, and that of his son, who survived him. That his grandson *Edward*, and his grand-daughters *Mary* and *Ann*, have *married*; but that his grandson *John Allen Compton*, the lessor of the plaintiff, remains *single*; and that the defendant has entered upon the *lower part* of the *Lain farm*, to recover which *John Allen Compton* has brought this ejectment. And the question is, Whether *John Allen Compton*, the lessor of the plaintiff, took any and what estate in the 3-4ths of the *Lower Lain Farm* upon the marriage of his brother *Edward* and his sisters *Mary* and *Ann*? It will be observed, that by this will the testator gave to his son all his lands expressly *for life*, and repeating the words, "*after his death*," in every one of the subsequent devises, divides those lands among his grandchildren, without using any words of limitation, or in any way describing the period during which it was his intention that they should enjoy them. From whence a person, not conversant with the rules laid down for the construction of instruments, would probably be led to infer that he meant the grandchildren should in some way take the whole interest in the several parts respectively devised to them; and that his purpose was completely to dispose by his will of the whole of his lands; not meaning that any thing should be claimed by his heir in that character. And it is by no means improbable but that

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ſuch was his intent. But, Mr. *Dampier*, who argued for the plaintiff, felt that the mere circumſtance of reſtricting the intereſt given to the ſon *to his life*, and the giving the remainder to the grandchildren, generally, without ſuch reſtriction, would not be ſufficient; and therefore he endeavoured to ſhew that the defendant was not entitled to the 3-4ths of the land in queſtion from other parts of the will: relying particularly on the deviſe of the *upper part* of the *Lain Farm*, which provides that if either of the deviſees of that part ſhould marry, they ſhould have paid *by the other two* 10*l*. a-year *during his life*; contending that the words, "*to have paid them by the others*," uſed in the clauſe reſpecting the *upper part* of the *Lain Farm*, and omitted in the deviſe in queſtion, *muſt be ſupplied in that deviſe*; as there could be no plauſible reaſon aſſigned for ſuppoſing that the teſtator meant to make a different diſpoſition of one part of the ſame farm to certain of his grandchildren, from that which he had made of another part of the ſame farm to others of his grandchildren; inſiſting on a maxim, well known as applicable to the moral character of man, "*noſcitur a ſociis*," as a rule to be adopted in the interpretation of wills. That the expoſition of every will muſt be founded on the whole inſtrument, and be made ex antecedentibus et conſequentibus is one of the moſt prominent canons of teſtamentary conſtruction; yet where between the parts there is no connexion by grammatical conſtruction, or by ſome reference expreſs or implied; and where there is nothing in the will declarative of ſome common purpoſe, from which it may be inferred that the teſtator meant a ſimilar diſpoſition by ſuch different parts; though he may have varied his phraſe, or expreſſed himſelf imperfectly; the Court cannot go into one part of a will to de-

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termine the meaning of another, *perfect in itself*, and *without ambiguity*, and not militating with any other provision respecting the same subject-matter; notwithstanding that a more probable disposition for the testator to have made may be collected from such assisted construction. If a man should devise generally his lands, after payment of his debts and legacies, his trust (*a*) estates would not pass: for in such case "noscitur a sociis" what the land is which the testator intended to pass by such devise; it is clear he could only mean lands, which he could subject to the payment of his debts and legacies. But from a testator having given persons in a certain degree of relationship to him a fee simple in a certain farm, no conclusion, which can be relied on, can be drawn, that his intention was to give to other persons, standing in the same rank of proximity, the same interest in another part of the same farm. Where the words of the two devises are different, the more natural conclusion is, that as his expressions are varied, they were altered because his intention on both cases was not the same. (His Lordship here referred to what Lord C. J. *Wilmot* says on this subject in his Reports, p. 233.) And, if it be necessary to cite them, there are not wanting authorities to shew, where clauses in a will are independent, that the one shall not govern the other, in cases where it is full as probable, as in this case, that the same interest was intended in both. If a devise be in these words, "I devise *Black-acre* to *J. S.*" Item, "I devise *White-acre* to *J. S. and his heirs*:" per *Coke* C. J. this is only an estate for life in *Black-acre*; for the item has no dependance on the first clause, but is distinct and several. 1 *Rol. Rep.* 369. *pl.* 23. So, where a man devised "to

(*a*) *Roe* v. *Read*, 8 *Term Rep.* 118.

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his son *Henry* and his heirs the house in which he dwelt. Item, to his son *Henry* his house in *J.* Item to his son *Henry* his houses in the tenure of *J. S.* Item *his pastures called* Southfields. Item all bargains, grants, and covenants, which he had from *Nicholas Webb*, his son *Henry* should enjoy and *his heirs for ever*, and for *lack of heirs of his body* to *remain to his son* Francis *for ever*." It was held that *Henry* took only an estate for life in the *Southfields*; and that the words were too ambiguous to disinherit an heir at law. *Spirt* v. *Bence*, *Cro. Car.* 368. In the case of *Counden* v. *Clerke*, *Hob.* 33. Lord *Hobart* says, "what "warrant is there, when the devisor speaks sensibly and "certainly, *to enlarge* his gift, for ought appeareth, *beyond* "*his meaning*; which is as great an injury as *to abridge* "*his meaning*." In the late case of *Doe ex dem. Child* v. *Wright* (*a*), the devise was in these words: "I devise "to my *grandson* James Wright all my lands, freehold, "copyhold, and leasehold, in the county of *Essex*. Also "I devise to *James Wright* all my *estate*, freehold and "copyhold, at *Ellington*, in the county of *Huntingdon*. "Also I give to my *grandson* John Wright all my *estate* "lands, &c. known by the name of the *Coal-yard*, in "*St. Giles's*. Also I give to my *grandson* James Cam-"per (who was his heir at law) the house I now live in, "and all my houses known by the name of the *Castle-*"*yard* in *Holborn*, in the tenure of *G. O.*" This Court, and afterwards in the Court of Common Pleas three of the Judges, were of opinion, that this devise gave only a life-estate to *James Wright* in the lands in *Essex*; notwithstanding the other devise, which gave him a fee in the lands in *Huntingdon*; and notwithstanding *John Wright* had a fee in the lands given him; and notwith-

(*a*) 8 *Term Rep.* 64. 1 *New Rep.* 335. and 7 *East*, 259.

standing

ſtanding *James Camper*, the heir at law, would take a fee in what was deviſed to him. And in that caſe, as in this, the argument was preſſed, that it could not but be ſuppoſed that the teſtator meant to give the ſame intereſts in the different eſtates deviſed to his three grandſons. The reaſoning in thoſe caſes applies to that now under our conſideration. The clauſes here are diſtinct and independent: there are no words of reference to connect them; and, without connecting them, no ſuch clear, unambiguous intention can be collected from implication, as is neceſſary to diſinherit the heir at law. For the teſtator might mean, that the 10*l.* a-year ſhould be a charge on the lands in the hands of his heir, in caſe of his grandchildren marrying: and if the words be not ſufficient to create ſuch charge in the hands of the heir, they will not be ſufficient of themſelves to give over the eſtate, and create ſuch charge upon it in the hands of another. And if, according to Mr. *Dampier*'s argument, on the marriage of the ſeveral deviſees, their ſhares ſhould be held to go over in fee to thoſe who ſhould remain ſingle, and in no event to the heir at law; that deviſee who remained longeſt ſingle, though he ſhould ultimately marry, would take a fee in the ſhares of all the others, notwithſtanding his having done that which determined the eſtates of his brother and ſiſters: which the teſtator hardly could have intended. And though there may be reaſons for thinking it improbable that he meant to charge his perſonalty with theſe ſums; yet it has not been denied, but that the words are ſufficient to charge the perſonalty, if there be no other funds on which theſe annual ſums can be thrown. But if that be not ſo, it is poſſible that a perſon, ſo ill adviſed as this teſtator appears to have been, may not have had any diſtinct fund or perſon in his contemplation,

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templation, on whom he meant to lay the charge; and it is only from the Court's seeing it was his intent to charge those devisees who should remain single, that it could say, that it was the intent of the testator that the plaintiff should take the shares of those who should marry. Another argument for the construction insisted on for the plaintiff has been taken from the charge of 5*l.* per ann. in favour of the testator's son's wife, if she should outlive him. But it must be observed that here is no *personal* charge on the devisees, nor a charge on the *estates given to them*, which might furnish an inference that the intent of the testator was, that the unmarried devisees should take the shares of those who might marry, from the improbability of his meaning being, that a burthen should be thrown on those who might remain single, by the conduct of the others in marrying. But the charge is simply a charge of 5*l.* a-year *on each of the farms;* a charge which will of course affect each of the farms into whosesoever hands they may go. Had the words used by the testator permitted us to construe the devise in question as creating a joint-tenancy, it is possible that, by so doing, his intent, as contended for, might have been effectuated: but after the several determinations (vide *Denn* v. *Gaskins*, *Cowp.* 660.) as to the effect in devises of the words "*equally to be divided*," and of the word "*equally*," without any thing to control their meaning; it is impossible to say, (and so it was admitted at the bar,) that the devise in question does not make a tenancy in common. And, after full consideration, we are of opinion that *John Allen Compton*, the lessor of the plaintiff, took no estate in the 3-4ths of the *lower part* of the *Lain farm;* and that the postea must be delivered to the defendant.

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TOWNSEND, Clerk, *against* WATHEN.

Tuesday, Jan. 26th.

If a man place dangerous traps, baited with flesh, in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbour's premises, must probably be attracted by their instinct into the traps; and in consequence of such act his neighbour's dogs be so attracted, and thereby injured, an action on the case lies.

THE plaintiff declared, in case, and stated that on the 1st of *April* 1800, and on divers other days, &c. the defendant, wrongfully intending to catch, maim, and destroy the plaintiff's dogs at *B.* &c. placed and procured to be placed divers traps, &c. in and about a certain wood called *Cattesfwood*, there situate, and near to divers public highways and footways, and also near to divers grounds of the plaintiff, and of other persons there situate, and procured to be placed pieces of flesh and other strong smelling things in and about the said traps, &c., and continued the said traps and pieces of flesh, &c. for a long time, &c.; and continued the same there in the day time, &c. and also on the several days and times procured to be trailed pieces of flesh and other strong smelling things along the ground about the said traps, &c. so laid as aforesaid, and from the said highways, footways, and grounds, towards and into the said traps, &c. By reason of which premises on the several days, &c. at *B.* aforesaid, divers dogs of the plaintiff, then and there lawfully going along the said public ways, &c. and others of the plaintiff's dogs, then and there lawfully being in his said grounds, and others of them in the said grounds of other persons, were by the scent of the said flesh and other things so placed and trailed, enticed from the said highways, footways, and grounds respectively, to the said traps, &c. and were caught therein, and greatly wounded, &c.

After a verdict for the plaintiff at the trial at *Gloucester* before *Macdonald* C. B. it was objected by *Williams* Serjt.

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on a motion for a new trial, that there was no evidence of any malicious intention againſt the plaintiff's dogs, or that the traps were ſet for the purpoſe of catching dogs in general; and that this was neceſſary to ſuſtain the action; the traps having been ſet in the defendant's own ground, on which the plaintiff's dogs muſt have been treſpaſſing at the time they were taken; and the defendant having a right to ſet the traps there. And a rule niſi was granted for ſetting aſide the verdict as againſt evidence: but the Court refuſed another rule which was alſo prayed, for arreſting the judgment: Lord *Ellenborough* C. J. ſaying that the count having charged that the traps were wrongfully ſet for the purpoſe of catching the *Plaintiff's* dogs, though ſet in the defendant's own ground, no doubt that the action was maintainable.

Upon reading the Chief Baron's report of the evidence, in this term, it appeared, that the plaintiff and defendant lived near each other in the country. The defendant was the owner of a wood called *Catteſwood*, about a mile in length, one end of which adjoined the plaintiff's grounds, within 150 yards of his dwelling houſe where he had reſided for about two years laſt paſt. Some time before the plaintiff went to reſide there, the defendant had procured half a dozen traps to be made much larger and ſtronger than thoſe uſually ſet for catching vermin, which he ſtated at the time to be intended for foxes, or any thing that came in the way; and in fact a ſheep had been caught in one, and a deer of the defendant's own in another of them. Some of theſe traps were ſet in *Catteſwood* by day and by night, and baited ſometimes with freſh, ſometimes with ſtinking fleſh. The wood was interſected by ſeveral public highways and paths; but the traps were ſo ſet near blind tracks in the wood made by perſons or by

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ſheep. The defendant's gamekeeper alſo trailed ſheeps' paunches, rubbed with annis ſeed, by a ſtring, at ſome diſtance round about the traps, (but this did not appear to have been done from the highways, or after the plaintiff came to reſide at his houſe,) in order to draw animals to them; and the defendant allowed 2*s.* 6*d.* for every fox or badger, and 1s. for every dog which was killed. In one year ſeven dogs had been taken and killed, which the defendant was proved to have known and approved of. *Catteſwood* was not a preſerve for game; nor did the whole of it belong to the defendant; nor was any board put up there to warn perſons of the traps: and the witneſſes ſtated their opinion, that the traps could not ſafely be ſo baited and ſcented in the day time when dogs were commonly paſſing with their owners through the wood; and that a dog, on account of the ſcent, could not paſs along the public paths without danger of being drawn by his inſtinct to the traps. All this, which had paſſed before the plaintiff came to reſide at his houſe, was continued afterwards; and at different times within the laſt two years ſeveral of his dogs had been caught in the traps which were baited with fleſh; by which ſome of them had been much injured and others entirely ſpoiled: and ſome of the traps were ſet in the wood ſo near to the plaintiff's houſe, that the baiting and the annis ſeed might be ſcented by his dogs which were kept there.

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Dauncey and *Abbott* were heard very ſhortly in ſupport of the verdict; the Court being deſirous of hearing the grounds of objection againſt it.

The Attorney General, *Garrow*, (and *C. F. Williams*,) in ſupport of the rule, after obſerving that the time of the trailing

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trailing round the traps was not diſtinctly marked in the report: and that in fact it had happened a long time before the plaintiff's dogs were caught (which was not denied;) and that there was no evidence that the traps were purpoſely ſet to catch the plaintiff's dogs; contended the defendant had a right to ſet the traps in his own ground, and to bait them, for the purpoſe of catching vermin; and that he was not anſwerable if the dogs of other perſons unlawfully treſpaſſing on his grounds were caught in the traps. The owners of dogs had only a right that the dogs ſhould paſs along the highways, with ſome perſon to attend them and reſtrain them, if ſuch was their inſtinct, from hunting the woods in queſt of game. If indeed the defendant had placed the traps ſo near any of the public paths that a dog going along there with his maſter muſt, notwithſtanding reaſonable care of the maſter, in all probability be drawn into them, the defendant would be liable; and ſo he would if he uſed means for the purpoſe of decoying them to the trap: but here the traps were ſet for the lawful purpoſe of catching vermin in the defendant's own ground; and if the owner of a dog likely to traverſe a wood in queſt of game will carry him, or ſuffer him to treſpaſs, there, without reſtraint, he muſt take the conſequences.

Lord ELLENBOROUGH C. J. It appears by the evidence reported, that the traps were placed ſo near to the plaintiff's court yard where his dogs were kept, that they might ſcent the bait, without committing any treſpaſs on the defendant's wood. Every man muſt be taken to contemplate the probable conſequences of the act he does. And therefore when the defendant cauſed traps ſcented with the ſtrongeſt meats to be placed ſo near to the plain-

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tiff's houfe as to influence the inftinct of thofe animals and draw them irrefiftably to their deftruction, he muft be confidered as contemplating this probable confequence of his act. That which might be taken as general evidence of malice againft all dogs, coming accidentally within the fphere of the attraction which he had placed there, muft furely be evidence of it againft thofe in particular which were placed neareft to the fource of attraction and within the conftant influence of it. What difference is there in reafon between drawing the animal into the trap by means of his inftinct which he cannot refift, and putting him there by manual force? If a man knowingly keep a dog accuftomed to bite, and any perfon coming by chance in his way be bitten, an action lies againft the owner, though he had no malice againft the particular individual. Here there is evidence that the defendant's purpofe in fetting the traps was to catch dogs in general, as well as vermin; for he afterwards recompenfed his fervant for dogs taken in the traps. The rule therefore, omnis ratihabitio retro trahitur et mandato æquiparatur, applies to this cafe. Without, therefore, confidering what had happened before the plaintiff came to his refidence in the defendant's neighbourhood; when he did come, he came to a place where the mifchief exifted and continued to operate within the fphere where he might lawfully have his dogs, and which, in fact, did afterwards operate upon them to the plaintiff's prejudice.

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GROSE J. I think there is evidence that the defendant meant to fet the traps for dogs as well as other animals; becaufe when dogs were caught in them, he rewarded his gamekeeper at the rate of fo much a head. This

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therefore was fit evidence to be left to the jury of his intention to catch the plaintiff's dogs as well as others. It is true that the traps were set in his own ground; but a man must not set traps of this dangerous description in a situation to invite his neighbour's dogs, and as it were to compel them by their instinct to come into the traps.

Lawrence J. There is no evidence of the defendant's having trailed round the traps while the plaintiff was residing at his house near the wood; but there is evidence of the traps having been baited after he came to reside there; and this, so near to the plaintiff's house as to draw his dogs to them by their scent. The very object of baiting traps is to draw animals towards them by their instinct from the course they are pursuing: when therefore the defendant placed his traps so baited in a situation so near to the plaintiff's house, as that his dogs kept there might scent the bait, he must be taken to have contemplated the natural consequence. He did, therefore, in the words of the declaration, entice the plaintiff's dogs, &c.

Le Blanc J. The only question now is whether the evidence sustains the verdict. If a man will put traps baited in places so near the highway as that dogs passing along there will probably be attracted by the scent into the traps; that is evidence that he does the act for the purpose of catching any dogs that may happen to pass along there. When the evidence is that before the plaintiff came to reside at his house, the defendant's gamekeeper used to trail meat rubbed with annis seed round about the traps; it is plain, that the intent was to attract

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all animals whose instinct was governed by the scent into the traps. Then, after the plaintiff came to reside at his house, the placing these baited traps so near to the plaintiff's premises where he kept his dogs as to attract them by the scent, must be evidence to go to the jury, that the traps were placed there for that purpose.

Rule discharged.

BARKER *against* BLAKES.

Monday, Feb. 1st.

THIS was an action on a policy of insurance on a quantity of oil by the ship *Hannah*, at and from *New York* to *Havre de Grace*, dated the 4th of *August* 1803; which was tried before Lord *Ellenborough* C J. at the sittings at *Guildhall* after *Hilary* term 1807, when a verdict was found for the plaintiff for 45*l.* 2*s.* 8*d.*, subject to the opinion of this Court on the following case:

The insurance was effected on behalf of the plaintiff, an *American* citizen resident in *America*, and the proprietor of the oil. The defendant subscribed the policy for 100*l.* The oil was of greater value than the amount of

1 It is no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country; the voyage and commerce not being of a hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of this country; though the neutral thereby subject his ship to be detained and carried into a *British* port for the purpose of search. And therefore a *British* underwriter, after condemnation of the enemy's goods found on board, and liberation of the ship and the rest of the cargo, is liable to the neutral owner of goods insured in the same ship whose voyage was so interrupted; either as for a total loss, if notice of abandonment upon the loss of the voyage be given in reasonable time; or for an average loss if such notice be given out of time.

2. Where a neutral ship bound from *America* to *Havre* was so detained and brought into a *British* port; and pending proceedings in the Admiralty the king declared *Havre* in a state of blockade, by which the further prosecution of the voyage was prohibited; this was held a total loss of the voyage, which entitled the neutral assured to abandon. But

3. The blockade of *Havre* having been publicly notified here on the 6th of *September*, and no notice of abandonment given till the 14th of *October*, nor any excuse substantiated for not giving it sooner for want of competent authority before, nor any new authority shewn for giving it then; held that the notice was out of time: and this, though the plaintiff's agents in this country had no notice till the 17th of *October* of the decree for restoration of the ship and goods in question, which had been pronounced on the 8th of *October*.

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all the infurances made upon it. The fhip *Hannah* was an *American* fhip, duly documented, and failed from *New York* on the voyage infured on the 4th of *July* 1803, with the oil on board; and on the 17th of *Auguft* following was arrefted in latitude 49 degrees North, longitude 8 degrees Weft, (being in the courfe of the voyage,) by *The True Blue*, a *Britifh* privateer, and fent into *Briftol*, where fhe arrived on the 30th of the fame month. *Havre de Grace* is in latitude 49 degrees North, longitude fix minutes Eaft. On the 21ft of *June* 1803 the following decree was iffued by the *French* Government, "That "from thenceforth there fhall not be received into any "of the ports of the *French* republic any colonial com- "modity coming from *Englifh* colonies, nor any goods "coming directly or indirectly from *England*." "Con- "fequently all goods and merchandize of *Englifh* ma- "nufacture, or coming from *Englifh* colonies, fhall be "confifcated." On the 6th of *Sept.* 1803 the *Britifh* Government declared the port of *Havre* to be in a ftate of blockade; and fuch blockade has continued ever fince. The fhip and cargo were libelled in the Court of Admiralty by the captors: and on the 8th of *October* following the fhip and the oil in queftion, and the reft of the cargo, were, by a fentence of that Court, ordered to be reftored to the ufe of the owners; fubject to the payment of freight and expences, but without cofts or damages; except one box of books, which was condemned as *French* property; and 53 hogfheads of bark, and 3646 pounds of whalebone, which were then referved for further proof, and were afterwards condemned as lawful prize by the following fentence. "*Hannah, Auguftus Ryan*, 9th "*Nov.* 1804. No further proof having been exhibited "of the property of 53 hogfheads of bark, and 3646 lb.

"of

" of whalebone; and the Judge, at the petition of *Bog*, " on motion of counsel, by interlocutory decree, con- " demned the said goods as good and lawful prize to *Ed-* " *ward Vincent Paul*, commander of the private ship of " war *True Blue*, in sight of his majesty's ship of war " *Phœnix*, *Wm. Baker* Esq. commander." On the 14th of *October* 1803 the plaintiff's agents in this country, who had effected the policy, abandoned the oil in question to the defendant and the other underwriters, in proportion to their respective interests. The agents of the plaintiff were apprised of the detention of the vessel, and of the suit in the Court of Admiralty, soon after they respectively took place; but were not parties to the suit, and did not know of the restoration of the vessel and cargo until the 17th of *October*, three days after the abandonment. The plaintiff's agents afterwards applied to the captain of the ship *Hannah* to reload the oil and convey it to *Havre*, which he positively refused to do, and declared that he should sail directly to *New York*. The ship *Hannah* cleared out at *Bristol* on the 20th of *December* 1803 for *New York*, and in *January* 1804 sailed for that place, leaving the oil in question at *Bristol*. The oil was afterwards sold in this country by agreement, without prejudice to the question between the assured and underwriters, to the best possible advantage; and the loss amounted in the whole to 45*l.* 2*s.* 8*d.* per cent., of which the freight and expences of restoration, paid under the sentence of the Court of Admiralty, amounted to 20*l.* 19*s.*; that is, the freight alone to 12 per cent., the expences to 8*l.* 19*s.* per cent. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover the whole, or any and which of the said sums?

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If the Court should be of opinion that he was entitled to recover any thing, the verdict was to be entered accordingly: otherwise a nonsuit was to be entered. The case was argued in last *Michaelmas* term, when

Abbott for the plaintiff contended, first, that the insurance was lawful at the time it was made, being upon a neutral ship, for a voyage from the neutral's country to a port in *France*, which it was lawful for the neutral to make, though *France* was at enmity with us; and such a voyage was not in contravention of any law of this country. 2dly, That the loss of the voyage, which entitled the assured to abandon, was derived from the original act of detention, without which the ship and cargo would not have come within the prohibition of the *French* decree of the 28th of *June* 1803; nor would the blockade of *Havre* by the *British* Government on the 6th of *September* have operated upon the voyage insured. Then even admitting that it was lawful for a *British* ship to bring the *American* into a *British* port in order to search for enemy's goods, yet it was not unlawful for a *British* underwriter to insure the neutral against the loss and expences consequent on such injurious detention, after the ship and the goods in question were restored by the sentence of the Court of Admiralty. The neutral owner is in no fault because his goods are embarked in a ship in which enemy's goods are also loaded. If there had been *English* goods on board the same ship, and a *French* cruiser had stopped the *American* and taken her into another port, where the *English* goods were seized and condemned, and the others liberated, it cannot be disputed but that the underwriters would have been liable to indemnify the expences in-

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curred by the neutral. The cafes of *Furtado* v. *Rodgers* (*a*), *Kellner* v. *Le Mefurier* (*b*), and *Gamba* v. *Le Mefurier* (*c*), which were infurances of enemies' property, do not apply: and in *Lubbock* v. *Potts* (*d*), the Court feemed to think that an infurance againft *Britifh capture, feizure, and detention*, generally, muft be conftrued as extending only to cover *unlawful* capture, &c.; or that even extending it to *temporary lawful detention*, without any fault of the affured, it would be good. 2dly, He contended that the abandonment was in time. The fhip and cargo were not ordered to be reftored till the 8th of *October*, and on the 14th the plaintiff's agents abandoned the goods infured to the underwriters, three days before they knew of the decree for reftoration. That the voyage was loft is clear; and unlefs it were neceffary for the affured to abandon immediately after notice of the detention, or of the blockade of *Havre* by our Government on the 6th of *September*, there feems no reafon why the election fhould not be open to his agents while they ftill remained ignorant of the event.

Scarlett, contrà, contended, firft, that at any rate the plaintiff could only recover for a partial, and not for a total lofs; the abandonment being out of time. The principle to be collected from all the cafes is, that where the voyage is loft, but the property is faved, the owner muft abandon, if at all, in the firft inftance; and cannot wait to fee whether he can profecute the voyage to advantage, and afterwards elect to abandon when he finds he cannot. And therefore in *Anderfon* v. *The Royal Exchange Company* (*e*), where notice of abandonment was

(*a*) 3 *Bof. & Pull.* 191. (*b*) 4 *Eaft*, 396. (*c*) *Ib.* 407.
(*d*) 7 *Eaft*, 451. (*e*) *Ib.* 38.

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not given till 18 days after notice of the lofs by the agent of the affured, it was held too late. Now here the veffel was detained on the 17th of *Auguft*; and taking that to have put an end to the voyage, and to have entitled the plaintiff's agents to abandon, they did not abandon till nearly two months after. But if the blockade of *Havre* on the 6th of *September* be the event to be looked to as putting an end to the voyage; that was an act of our own Government, againft which the underwriters cannot be taken to have infured, according to *Hadkinfon* v. *Robinfon* (a). Neither can the *French* decree of the 21ft of *June* 1803 be confidered as a peril infured againft. The queftion muft therefore reft on the ground of the original detention; and if that put an end to the voyage, the affured fhould, without waiting for events, have given immediate notice of abandonment. At any rate, if the blockade by our Government on the 6th of *September* be confidered as a new contingency which defeated the voyage, on which a new right of abandonment attached, notice of abandonment fhould have been given immediately afterwards; and it came too late after the decree for reftoration of the goods on the 8th of *October*. But, 2dly, The lofs did not happen from any rifk within the policy. The detainer of the fhip was clearly lawful, and fome of the goods found on board were actually condemned as prize: and the policy does not extend to indemnify the affured againft the confequences of a legal detention by a *Britifh* captor. The law knows no diftinction in this refpect between the owner of the fhip and the owner of goods on board it. The latter muft take the fate of the fhip owner with refpect to infurance. If a fhip be not fea-worthy, or be warranted neutral and do

(a) 3 *Bof.* & *Pull.* 388.

any

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any act to break its neutrality; though the owner of goods on board have no control over the acts of the ship, and be in no fault, his insurance is equally avoided. *Furtado* v. *Rodgers* (*a*), was the case of an insurance from *Bayonne* to *Martinique* and back again, made during peace; and on the breaking out of the war with *France* afterwards, the ship was captured at *Martinique*: but the ground of the decision there was, that where a *British* subject insures against capture generally, there is an implied exception of capture by the authority of our own government, though subsequently given. *Kellner* v. *Le Mesurier* (*b*), followed upon the same ground. The capture of any neutral can only be justified by the subsequent condemnation; and the captor acts at the peril of disproving the neutrality, or shewing some just ground whereby the privilege is forfeited by an act done in prejudice of the belligerent. If a neutral ship act in aid of the enemy by protecting his goods, and it be lawful for a *British* ship to seize the neutral and bring her into port for the purpose of search, and the event justify the seizure; it is as much against public policy to suffer a *British* subject to insure against such seizure and the necessary consequences of it, as to insure against the capture of an enemy's ship. This question did not occur in *Lubbock* v. *Potts* (*c*), and what fell from the Court incidentally in the course of the argument must be taken with reference to the case in judgment, which was that of a *British* ship insured against *British* detention, &c. by which the Court seemed inclined to understand illegal detention; or at least legal detention, which was only temporary, but which might occasion the loss of the market.

(*a*) 3 *Bos. & Pull.* 191. (*b*) 4 *East*, 396. (*c*) 7 *East*, 451.

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Abbott in reply. As to the queſtion of timely abandonment; there is no preciſe period for it; the law only requires it ſhould be made within a reaſonable time. Now till the 6th of *September* when *Havre* was declared to be blockaded, the aſſured might have intended to purſue the voyage when the ſhip and cargo were liberated: but the blockade was a new and unforeſeen occurrence ariſing out of the detention of the ſhip; and the queſtion is whether it were unreaſonable to wait after that till the 14th of *October* before the notice to abandon was given: for as to the French decree, it was then doubtful whether it would be deemed to apply to a neutral who was *forced* into an enemy's port. As to the laſt and principal point, *Kellner* v. *Le Meſurier* was certainly decided on the ground of its being enemy's property; for the plaintiff declared on a loſs by capture as *prize by the King*; and this was relied on in the judgment there given (*b*). And all the caſes where the objection has been ſuſtained in the caſe of a neutral were founded upon unlawful acts done by the neutral; which diſtinguiſhes thoſe caſes from the preſent. Suppoſe the enemy was blockading a port of this kingdom, and a neutral in attempting to force the blockade was taken; though the loſs would be by his own act, yet a *Britiſh* underwriter would be liable. If the objection were to prevail on the general ground in this caſe, it would in effect be declaring, that any inſurance of neutral goods from a neutral to an enemy's country, though in a neutral ſhip, was illegal.

The Court, from the extenſive conſequences involved in the determination of the general queſtion, wiſhed to have had the caſe argued again; but underſtanding that

(*a*) 4 *Eaſt*, 401.

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the value of the property was inconfiderable, and that the parties were difinclined to incur any further expence, they faid they would confider of it, and give their opinion another time. And now,

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Lord ELLENBOROUGH C. J. delivered judgment.

This was an action on a policy of infurance, dated the 4th of *Auguft* 1803, on a quantity of oil belonging to an *American* proprietor, fhipped on board an *American* fhip, the *Hannah*, on a voyage at and from *New York* to *Havre de Grace*. [After ftating the cafe, his Lordfhip proceeded.]

The whole amount of lofs claimed on the part of the plaintiff is 45*l.* 2*s.* 8*d*, confifting of 20*l.* 19*s.*, the freight and expences paid under the fentence of the Court of Admiralty, and 24*l.* 3*s.* 8*d.* the difference, I prefume, between the invoice value of the oil in *America*, and the proceeds of the fale here. The defendant contends, that the plaintiff is at any rate not entitled to recover the latter item of lofs; his claim thereto being merely founded on an abandonment which was not made, as the defendant infifts, in due time. But he further contends, that the plaintiff cannot by law recover at all, even to the extent of the average lofs of his freight and expences, under this policy; and that to allow of fuch a recovery would be to allow of an indemnity being afforded, through the medium of *Britifh* infurance, to neutrals, acting in contravention of the interefts and policy of *Great Britain*, in the carrying of the goods of its enemies. That in fo doing the neutral had, in effect, violated the duties of his neutrality, and affumed a hoftile character in refpect to this country. But it does not appear to us that this general objection to the plaintiff's right to recover is well founded,

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founded. The *American* was at liberty to purſue his commerce with *France*, and to be the carrier of goods for *French* ſubjects; at the riſk indeed of having his voyage interrupted by the goods being ſeized; or of the veſſel itſelf, on board of which they were, being detained, or brought into *Britiſh* ports, for the purpoſe of ſearch: but the mere act of carrying ſuch enemies' goods on board his veſſel conſtituted no violation of neutrality on the part of the *American*; nor did the arreſt and detention of his veſſel, for the purpoſe of ſearch and eventual condemnation of the goods which might be found on board belonging to the enemy, form any breach of our duty towards the *American*. The indemnity ſought under the policy in this caſe is not an indemnity to an enemy or to a neutral forfeiting his neutrality by an act hoſtilely done by him againſt the intereſts of *Great Britain*; but an indemnity to a neutral, as ſuch, againſt the conſequences of an act innocently and allowably done by him in the exerciſe of his own neutral rights; and as innocently and allowably to a certain degree controlled and interrupted on our part, in the exerciſe of our rights, as belligerents, againſt enemies' property found on board the ſhip of a neutral. Theſe rights, though they are in a degree adverſe to each other, do not, therefore, in the exerciſe of them, neceſſarily place either party in the ſituation of an enemy to the other. The various competitions for commercial advantage and ſuperiority, which take place between different nations; their mutual excluſions of each other by their reſpective municipal regulations; are ſo many acts of adverſe policy and conflicting rights, exerciſed towards each other; but they occur without producing any breach of national amity. And it has never yet, in any inſtance, that I am aware of, been held

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a breach of implied duty in the ſubjects of either ſtate to lend their aſſiſtance by inſurance or otherwiſe to ſuch rival or excluſive commerce or intereſts of the other. Caſes of expreſs public prohibition, and that degree of aſſiſtance to enemies which conſtitutes a ſociety in war againſt any particular ſtate, fall of courſe under a different conſideration, and are neceſſarily to be underſtood as interdicted ſubjects of inſurance in every country to which this ſpecies of contract is known. The voyage and commerce, therefore, in the courſe of which the veſſel carrying the goods inſured was in this caſe engaged, not being either of a hoſtile deſcription, nor in any other way expreſsly or impliedly forbidden by the law or policy of this country, the general objection to the plaintiff's recovering at all under this policy of aſſurance falls to the ground. Which brings the caſe under our conſideration to this point, Whether the plaintiff be entitled, under the circumſtances, to recover as for a total loſs, or for the freight and expences adjudged by the Court of Admiralty to be paid, as an average loſs only.

In order to entitle himſelf to recover as for a total loſs, the plaintiff muſt eſtabliſh two things: Firſt, That *a loſs of the voyage* (the only deſcription of loſs which can be contended for in this caſe, as the goods themſelves have been ordered to be reſtored, and are capable of being ſo,) *was occaſioned by the detention in queſtion*, which continued until and after the blockade took place, which rendered the proſecution of the voyage to *Havre* no longer practicable: and, ſecondly, (ſuppoſing a loſs ſo occaſioned to be a total loſs, "by detention," within the policy;) that the *abandonment* of the goods was made *in due time*. And thinking, as we do, that the impoſſibility of proſecuting the voyage to the place of deſtination, which aroſe during

and

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and in consequence of the prolonged detention of the ship and cargo, may be properly considered as a loss of the voyage; and such loss of voyage, upon received principles of insurance law, as a total loss of the goods which were to have been transported in the course of such voyage; provided such loss had been followed by a sufficiently prompt and immediate notice of abandonment. We are of opinion, however, upon the authority of the cases adverted to in the argument, that this abandonment which was made on the 14th of *Oct.* 1803, above five weeks after the blockade of *Havre* had been publicly notified; the latest event to which the loss of voyage is capable of being referred; was not made within those reasonable and convenient limits of time which the law allows for this purpose. And it is to be observed, that no excuse for the lateness of the abandonment is offered on the score of any want of competent powers in the parties making the abandonment: as they do not appear to have been furnished with any other powers for this purpose at last, than what they must be supposed to have originally possessed, if they ever had any. The loss in question must, therefore, for want of a timely notice of abandonment, be regarded merely as an average loss; and the verdict must of course be restricted to the sum of 20*l.* 19*s.* the amount of the freight and expences to which the assured was subjected by the sentence of the Court of Admiralty. Judgment for that sum, and no more, must be given accordingly.

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The KING *against* The Inhabitants of RIPON.

Wednesday, Feb. 3d.

An indenture binding an adult as an apprentice, which was not executed by herself, but only by her father-in-law and the master, though with her consent, does not constitute her an apprentice; and consequently no settlement can be gained by her under such indenture.

THE sessions, on appeal, quashed an order of justices, for removing *Elinor Forton*, a pauper, from the township of *Ripon* in the *West Riding* of the county of *York*, to the parish of *Darlington* in the county of *Durham*; subject to the opinion of this Court on the following case:

The pauper *Elinor Forton*, being 23 years of age, was put apprentice by her father-in-law with her own consent, to one *Husbands* in *Hunton*. She was present at the making of the agreement; but the indenture was only executed by the master and her father-in-law, but not by herself: neither was it ever tendered to her for that purpose, though she lived under it with her master for nearly 12 months in *Hunton*. The Sessions were of opinion that she gained a settlement in *Hunton*. But when the case was called on

The Court asked whether it were possible to maintain this to be a competent binding of an adult who was no party to the indenture? The relation of master and apprentice did not exist.

Park and *Hullock* who were to have argued in support of the order of sessions admitted that they could not support it.

Dampier and *Scarlet* contra.

Order of sessions quashed.

Monday, Feb. 1st.

ROBINSON qui tam *against* GARTHWAITE.

A captain in the militia receiving his pay and contingent allowances, before his qualification was properly authenticated, is not *executing any power* directed by the militia act of the 42 *G.* 3. *c.* 90 to be executed by captains, so as to bring him within the penalty of the 14th clause; the receipt of such pay and allowances not being provided for by that statute, even if any other than acts of military discipline were intended to be so prohibited.
Though a penal action be removed out of the proper county into another for trial, yet the cause of action must still be proved to have happened within the proper county where the venue is laid.

IN debt for penalties of 100*l.* alleged to have been incurred by the defendant under the militia act of the 42 *Geo.* 3. *c.* 90. *f.* 14. the 4th count of the declaration, on which the plaintiff took a verdict, stated that the defendant, a captain in the 2d royal *Surrey* regiment of militia, executed certain powers directed by the statute to be executed by captains, viz. by *acting as a captain* in the said militia, without having delivered in such specific description of his qualification as is required by the statute, whereby, &c. The venue was laid in the county of the town of *Kingston* upon *Hull*, and the cause was tried at *York* before *Chambre* J. when it appeared that the defendant was duly qualified to hold his commission as a younger son of a person seised of an estate of above 600*l.* a-year, but in the first description of his qualification sent into the clerk of the peace, as required by *f.* 6. and 12. of the act, there was a defect in omitting to state the parishes wherein the estate was situated, which was afterwards rectified by sending in a proper description of them. The plaintiff however proved, that prior to the mistake being rectified, the defendant had acted as captain upon the parade, and at the guard-house, and had also sat as president of a court martial; but it appearing afterwards that these acts were all done in the county of *York* where the trial was had under the stat. 38 *Geo.* 3. *c.* 52. and not within the county of *Hull* where the venue was laid, the learned Judge held that they could not be received in evidence: for though as to the latter instance, the sentence of the court martial was afterwards read and executed

cuted at the citadel in *Hull*, yet the defendant was not proved to have been prefent there upon the occafion. The only act proved to have been done by the defendant in *Hull* previous to the completion of his qualification, and which was contended to be the execution of a power directed by the ftatute (*a*), to be executed by captains, was *the receipt of his pay and contingent allowances*, as captain, at a banking houfe in *Hull*. And on this a verdict was taken for the plaintiff on the 4th count, with liberty to the defendant to move to enter a nonfuit.

Park in the laft term moved for a rule for entering a nonfuit, on the ground that the receipt of the defendant's pay and contingent allowances was not the execution of any *power* directed by the ftatute, as no provifion was therein made for any fuch payment; even if the act of receiving money could be confidered as the exercife of a *power*. He alfo moved in arreft of judgment, becaufe it was not ftated in the declaration in what way the defendant had *acted as captain*; fo that he had no notice what he was to anfwer; and this too in a penal action. A rule nifi was granted on both points; which came on now to be difcuffed; when, after hearing *Topping* and *Richardfon*, who fhewed caufe againft the rule,

The Court (*b*) were clearly of opinion that the rule for entering a nonfuit fhould be made abfolute. This being

(*a*) Sect. 14. enacts, "That if any perfon fhall execute any of the "powers hereby directed to be executed by captains, not being qualified "as aforefaid, or without having delivered in fuch fpecific defcription "of his qualification as before required, &c. he fhall forfeit 100*l*." &c.

(*b*) *Lawrence* J. was abfent on this day, affifting the Lord Chancellor on the hearing of a caufe in the Court of Chancery.

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a penal action, the clause giving the penalty ought not to be extended by construction beyond the plain words of it, which confined the offence to the executing any of the powers directed by the act, without the qualification required. The receipt of the pay and contingent allowances of a captain was admitted not to be provided for by the act in question, and therefore at any rate such receipt was no execution of any power directed by the act to be executed by captains; even if any thing more were intended by that clause than to subject unqualified officers to the penalty if they executed any act of military discipline; which Lord *Ellenborough* inclined to question.

Rule absolute for entering a nonsuit.

Wednesday, Feb. 3d.

PHILLIPS *against* BACON.

In an action on the case against the sheriff for negligent and wrongful conduct in conducting the sale of the plaintiff's goods under a writ of fieri facias, by which they were sold much under value, where, in stating the substance of the writ, the count alleged that the sheriff was commanded to levy 80*s.* awarded to *J. C.* for his *damages sustained by occasion of the detaining the debt*, that is proved by the writ which stated that the 80*s.* were awarded to *J. C.* for his *damages* sustained *as well* by reason of *detaining the debt* as for his *costs*, &c.; for *costs* are in legal sense included in the word *damages*.

THE first count of the declaration stated, that on the 25th of *April* 1806 a non omittas fieri facias writ issued out of *B. R.* directed to the sheriff of *Glamorgan*, by which writ the king commanded the said sheriff that of the goods and chattels of the plaintiff in his bailiwick he should cause to be levied as well a certain debt of 254*l.* which *J. Cameron* in the said court had lately recovered against him, as also 80*s.* which were awarded to the said *J. C.* for his *damages* which he had sustained *by occasion of the detaining the said debt*, whereof the plaintiff was convicted; and that the sheriff should have that money before the king's justices, &c. on a certain day therein mentioned,

mentioned, and long since passed, to render to the said *J. C.* for his debt and damages, and should have there then that writ: which writ afterwards, and before the return thereof, to wit, on the 29th of *April* 1806, was delivered to the defendant, who then and until after the return thereof was sheriff of *Glamorgan*, to be executed in due form of law; by virtue of which writ the defendant, as such sheriff, before the return, seized and took into his possession divers cattle, goods, and chattels of the plaintiff, of the value of 1200*l*.; and proceeded to the sale thereof, and sold the same under and by colour and pretence of the said writ for prices amounting in the whole to a small sum, to wit, 200*l*. And the defendant, not regarding his duty in that behalf, as such sheriff, but wrongfully intending to injure and prejudice the plaintiff in this respect, wrongfully and injuriously conducted himself so negligently, deceitfully, fraudulently, and improperly in the same proceeding to the sale of and selling the said cattle, goods, and chattels, upon that occasion, that by reason of such his neglect, deceitful, fraudulent, and improper conduct, the same were sold for much less than the real value thereof, and than the same might and ought to have been sold for by him, had he conducted himself with due care and diligence, and uprightly and properly in that behalf, viz. at prices amounting in the whole to 1000*l*. less than the real value, or less than they might or ought to have been sold for. There were other special counts to the like effect: and there was a fifth count, in trover, for so many horses, &c. and pipes of wine. Plea not guilty.

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The case was tried before *Macdonald* C. B. at *Hereford*; and by the words of the writ when produced the sheriff was commanded to cause to be levied of the plain-

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tiff's goods, &c. "as well a certain debt of 254*l.* which "*J. C.* in the said Court had recovered against him, as "also 80*s.* which in our same Court were awarded to "the said *J. C.* for his damages which he had sustained "*as well* by reason of detaining the said *debt*, as for his "*costs* and charges by him about his suit in that behalf "expended, whereof the said *R. M. P.* (the plaintiff) "is convicted," &c. In the result, the case did not go to the jury on the count in trover, but only on the special count; between which and the writ it was objected that there was a material variance; the writ declared on stating the 80*s.* to be awarded to *J. C.* "for his "*damages* sustained by occasion of the detaining the said "debt;" the writ proved stating the 80*s.* to be awarded "for his *damages as well* by reason of detaining the said "debt, as for his *costs* and charges, &c." The Chief Baron reserved the question, but let the case go to the jury, who found a verdict for the plaintiff for 500*l.* damages; and the defendant had leave to move to set aside the verdict and enter a nonsuit; for which he obtained a rule nisi in the last term.

Dauncey, *Bevan*, *Clifford*, *Abbott*, and *Peake*, now shewed cause against the rule. The very words of the writ, which was only inducement to the action, and not the gist of it, need not and are not affected to be stated in the count, but it was sufficient to state the substance and legal effect of it (*a*). This differs the case from *Baynes* v. *Forrest* (*b*),

(*a*) Per *Buller* J. in *Gwinnet* v. *Phillips*, 3 *Term Rep.* 646. and in *Angerstein* v. *Clarke*, 4 *Term Rep.* 616. *King* v. *Pippett*, 1 *Term Rep.* 235. *Hendray* v. *Spencer*, *ib.* 238. *Cuming* v. *Sibley*, *ib.* 239. and *Warre* v *Harbin*, 2 *H. Blac.* 113.

(*b*) 2 *Stra.* 892.

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Coy v. *Hymas* (*a*), and other cafes where the record declared on was the gift of the action; and alfo from *Briftow* v. *Wright* (*b*), and other cafes of declarations on contracts, for the like reafon. The *cofts* are a part of the *damages* fuftained by the detention of the debt, and the word *damages* is fufficiently large to comprehend *cofts*. This appears from the old entries. *Cliff's Entr.* 850. *pl.* 43. *Raft. Entr.* 194. *pl.* 4. *Co. Entr.* 147. 150, 151, 2. So in *Co. Lit.* 257. *a.* where *Littleton* mentions *damages* Lord *Coke* fays, that *cofts* are included: and in 2 *Inft.* 288. he fays, cofts are in law fo coupled together as they are accounted parcel of the damages. The very writ of fieri facias in debt (*c*), fo confiders them; for after commanding the fheriff to levy for the damages and cofts, it directs him to have that money before the king at *Weftminfter* to render to the plaintiff for his debt *and damages* aforefaid. They alfo cited for the fame purpofe *Pilfold*'s cafe (*d*), *Wentworth* v. *Squibb* (*e*), *Afhmore* v. *Rypley* (*f*), *Grenville* v. *Sandwich* (*g*), and *Witham* v. *Hill* (*h*).

There was another point made in argument, whether, fuppofing the variance to be fatal the plaintiff might not refort to his general count in trover, upon the ground that the fale having been grofsly fraudulent, and the conduct of the officers highly culpable; being founded, as was alleged in a confpiracy to defpoil the plaintiff of his property; it avoided the protection of the writ to the fheriff, under which it was pretended to be made. But as it became unneceffary in the refult for the Court to give any opinion on this point, the facts on which it was raifed

(*a*) 2 *Stra.* 1171. and *Barnes* v. *Conftantine*, *Yelv.* 46.

(*b*) *Dougl.* 665. (*c*) 2 *Imp. Pract.* 465, 6. (*d*) 10 *Co.* 115. *b.*

(*e*) 1 *Lutw.* 640. (*f*) *Cro. Jac.* 420.

(*g*) 7 *Vin. Abr.* 29[illegible]. *pl.* 12. and 2 *D'Anvers*, 462. (*h*) 2 *Wilf.* 91.

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are not ſtated. The authorities referred to were the ſix carpenters' caſe (*a*), where it was reſolved that where entry, authority, or licence is given to any one by the law, and he abuſes it, he ſhall be a treſpaſſer ab initio. *Freeman* v. *Blewitt* (*b*), and 20. *Vin. Abr.* 501. *pl.* 16.

The Attorney General, *Jervis*, *Wigley* and *Hall*, contrà, inſiſted upon the variance between the count and the writ proved; the latter of which ſtated that the damages were given for two things, the detention of the debt, and the coſts of ſuit; whereas the writ ſet forth in the count only alleged the damages to have been given for the detention of the debt. It was neceſſary for the plaintiff in charging the ſheriff with negligence and improper conduct in the execution of a particular writ to ſet out that writ; and the variance, it was ſaid, was in matter of deſcription, which is fatal, according to the rule lately laid down in *Purcell* v. *Macnamara* (*c*). They obſerved that in *Pilſold*'s caſe (*d*) before cited, the word *damna* was admitted to have two ſeveral ſignifications in law; the one proper and general, which included *coſts*; the other relative and ſtrict, which excluded them: and that damna pro injuria illata, et pro expenſis litis, were two diſtinct things: and this diſtinction is an anſwer to all the other authorities cited, where the word damna or damages was uſed in its general ſignification. But in the writ proved it is plain, that the word *coſts* is uſed in contradiſtinction or ſuperaddition to *damages* for the detention of the debt; and therefore the word *damages* muſt there be taken in its relative and ſtrict ſenſe. If

(*a*) 8 *Co.* 146. (*b*) *Salk.* 409. and 1 *Ld. Ray.* 632.
(*c*) Ante, 157. (*d*) 10 *Co.* 116. *b.* 117. *a.*

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the declaration had merely ſtated, that the plaintiff had recovered ſo much for his damages; that might have been ſufficient; but going on to ſtate that the damages awarded were for detaining the debt; the allegation was diſproved by the writ. The caſes of *King* v. *Pippet*, *Cuming* v. *Sibley*, *Hendray* v. *Spencer*, and *Warre* v. *Harbin*, were conſidered, whether rightly or not, as allegations of ſubſtance, and not of deſcription. But in *Raſtall* v. *Stratton* (*a*), a declaration on a judgment for coſts, ſtating the action to have been brought againſt one defendant only, when it was againſt two, was held to be fatal: and yet the other defendant having been outlawed (*b*), judgment for the coſts could only have been recovered by the one who ſued on the judgment; and therefore in ſubſtance it was the ſame thing. So in *Savage* v. *Smith* (*c*), in debt againſt a bailiff on the ſtat. 28 *Eliz.* for extorting illegal fees in executing a fieri facias; even aſſuming that the plaintiff need not have ſet out the judgment on which the writ was founded; yet having ſet it out, he was held bound to ſtrict proof of it as ſtated.

Lord ELLENBOROUGH C. J. Two points have been made, one of which it is not neceſſary to decide; becauſe if the judge did not leave the caſe to the jury upon the count in trover, no queſtion can ariſe on it. But if the queſtion had ariſen, as at preſent adviſed, I ſhould have inclined very ſtrongly from the argument I have heard to have held, that if the ſheriff, or his officers acting for him, depart ſo entirely and ſcandalouſly from their duty in making a mock ſale of the goods in the manner which has been repreſented to us, it could not be conſidered as

(*a*) 1 *H. Blac.* 49. (*b*) Vide S. C. 2 *Term Rep.* 366.
(*c*) 2 *Blac. Rep.* 1101.

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a sale in obedience to the writ of fieri facias, but rather a conspiracy to despoil the plaintiff of his property, and would bring the case within the principle of the six carpenters' case, and make the sheriff a trespasser ab initio. To be sure the instances there put are, with one exception, where the officer acts under a general warrant of law, and not by a particular mandate (*a*), as here; but one instance is that of a purveyor taking cattle by force of a commission for the King's use; where the selling of them afterwards in the market made the first taking wrongful. This point however is now withdrawn from the consideration of the Court. With respect to the other point, on the variance, I adhere to the distinction which was taken in *Purcell* v. *Macnamara* (*b*), between allegations of matters of substance and of description. If the plaintiff had undertaken to set out the writ in ipsis verbis, or with a prout patet, &c. it would have fixed him to prove it exactly as he had described it: but here all that he undertakes to do is to state the substance of it, and he does this by stating that the writ was to levy 254*l.* for the debt and 80*s.* for the *damages* occasioned by the detention of the said debt: and this is substantially proved. The objection is that by the writ itself it appears that the 80*s.* was awarded for the damages which the plaintiff had sustained as well for detaining the debt as for *costs*. But *costs* are a consequence by the statute of *Gloucester* of detaining the debt, and are part of the *damages*. In contemplation of law the word *damages* emphatically includes *costs*. It is so considered by Lord *Coke*, and in the various authorities which have been cited. *Costs* therefore properly fall under the nomen generale

(*a*) Vide Cases collected in 20 *Vin. Abr.* Trespass. 501, 502.

(*b*) *Ante*, 160.

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generale of *damages*; and the whole 80*s*. may properly be ſtated as awarded to be levied for damages ſuſtained by occaſion of the detaining of the debt; though if it were neceſſary to come to a ſpecification of the component ſum of 80*s*. it would appear that part of it was for the coſts. The detention of the debt is the cauſe of *damages* both in the peculiar ſenſe of the word, and in reſpect of the coſts. In the caſe of *Grenville* v. *Sandwich* the error imputed was only repelled on the ground that the damages included the coſts.

GROSE and LE BLANC, Juſtices, aſſented (*a*). The latter obſerved, that it was admitted that if the allegation had been general, that the 80*s*. were awarded to the plaintiff for his *damages*, that would have done. Then what difference does it make when it is ſaid for his damages "ſuſtained by occaſion of the detaining the ſaid debt;" the coſts being a conſequence of ſuch detention, and the law coupling them together under the general name of *damages*. The ſubſtance only of the writ being ſet out, the allegation was ſubſtantially proved.

Rule diſcharged.

(*a*) Mr Juſtice *Lawrence* was abſent.

Friday, Feb. 5th.

GOODRIGHT, on the Demise of ANN HOSKINS, *against* THOMAS HOSKINS.

By a bequest of leasehold to *R. until his* (eldest) *son T.* shall *attain* 21, *and no longer*; but *in case* T. *shall die in minority, then* to *J.* or *O.* (his younger brothers) or either surviving or attaining 21, as aforesaid; with a desire *that* R. *would quit and deliver up the premises as aforesaid*, and *confirming* the bequest of them to *R.*'s family on his relinquishment of a certain claim, which he did relinquish: held that *T.* on his attaining 21 took the estate by necessary implication; though there was a devise of the residue to *N.* the younger brother of *R.*

THIS was an ejectment for a messuage and lands, called *Roskief*, in the parish of *Saint Allen* in the county of *Cornwail*, and the demise was laid on the 13th of *March* 1805. At the trial at *Bodmin*, before *Graham* B. a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:

John Hoskins was possessed of the premises in question for a term of 99 years, still subsisting, and also of other leasehold premises, called *Boswellack*. On the 17th of *March* 1800, having two sons, *Richard* and *Nicholas*, and *Richard* having nine children, of whom *Thomas*, *John*, *Richard*, and *Dorothy*, were four; *John Hoskins* made his will, in which, after giving to his wife, *Ann Hoskins*, an annuity of 10*l.* for her life, payable out of his interest in the leasehold premises of *Boswellack*, and 20*l.* worth of such articles of household furniture as she should select, are these words; "I also give and bequeath unto "my beloved son *Richard Hoskins* 5 *guineas*, and desire that "he may, as soon as may be, be paid his wife's distribu-"tive share out of *Boswellack*, as the same was settled "by bond made previous to my marriage with my said "wife *Ann*. I likewise give and bequeath unto my said son "*Richard* the leasehold premises of *Roskief* in *Saint Allen* "aforesaid, to hold the same unto my said son *Richard* "*until his son* Thomas *shall attain his age of* 21 *years, and* "*no longer:* but *in case the said* Thomas Hoskins *shall die* "*in minority*, then my will is, and I do hereby give and "bequeath the said leasehold premises of *Roskief* unto

"*John*

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" *John*, or *Richard*, fons of the faid *Richard Hofkins*, or " either of them furviving or attaining their age of 21 " years as aforefaid. And I defire *the faid premifes of* " Rofkief *may be quitted and delivered up as aforefaid by* " *my faid fon* Richard Hofkins *accordingly*. My will and " meaning further is, and I do hereby particularly order " and direct, that in cafe my faid fon *Richard Hofkins* " do charge my executor, or claim or demand any in- " tereft, or compenfation for the fame, for the fum " which may appear to be his wife's diftributive portion " out of *Bofwellack*, as aforefaid; or any way attempt to " defeat the purpofes of my will; I do then and in that " cafe revoke the faid bequeft of *Rofkief*, and all other " the legacies given him or his family, and do give him " the faid *Richard Hofkins*, my fon, five fhillings only. " But if, on the contrary, my faid fon *Richard* do quit " all claim to the faid intereft on his wife's diftributive " portion as aforefaid, and in every other refpect abide " by the purpofes of this my will; I do fully *ratify and* " *confirm* the faid bequeft of *Rofkief in manner and form* " *as aforefaid*, and the *other* legacies hereinafter given to " *his family*" He afterwards gave fome fmall pecuniary legacies to different relatives; and, amongft others, three guineas to each of his grandchildren, and feven guineas in addition to his grand-daughter *Dorothy*; and made his fon *Nicholas* refiduary legatee and executor; and alfo directed him to provide decent maintenance for his brother *Richard* during his life. *John Hofkins* the teftator died on the 12th of *December* 1804, poffeffed of the feveral premifes mentioned in his will; leaving *Ann* his widow, the leffor of the plaintiff, *Richard* his fon, and his three grandchildren, *Thomas*, *John*, and *Richard*, furviving him;

all

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all of whom are now living. *Nicholas*, the testator's son, whom he made his residuary legatee and sole executor, died in his lifetime. Administration with the will annexed, and administration of all goods, &c. undisposed of by the said will was granted to *Ann Hoskins*, the lessor of the plaintiff, before *March* 1805. *Thomas Hoskins*, the grandson of the testator, who is about 25 years of age, entered upon the premises in question on the death of the testator, and has been in possession of the same ever since. It is agreed that the want of assent by the administratrix shall not operate to the prejudice of *Thomas Hoskins*' claim. *Richard Hoskins*, the testator's son, never did any of those things, upon the doing of which the bequests to him and his family were revoked. If the plaintiff were entitled to recover, the verdict was to stand: if not, a nonsuit was to be entered.

Dampier, for the plaintiff, said that the only question was, Whether by necessary implication *Thomas Hoskins*, the defendant, the testator's grandson, must take the estate of *Roskief*, as certainly there was no bequest of it to him in terms: and he denied the necessity of such an implication; the testator having given the residue of his property, not otherwise disposed of, to his son *Nicholas*, whom he made his executor, and charged with the maintenance of another relation for his life. The estate is given to the testator's son *Richard* until *Thomas* came of age; but there is no bequest of it at that period to *Thomas* himself; though it is given over to his brothers if he should die before he was of age. It is probable that the testator meant to have given it to *Thomas*, when he came of age; but he has omitted to do so, and the

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Court cannot supply that omission, as was held in *Chapman* v. *Brown* (*a*), where the limitation to the second son of the brother's family who were the objects of the testator's bounty was by mistake omitted. Most of the cases where implications of this sort have been raised are, where the devise was of an estate of inheritance which was given over to the heir at law of the testator after the death, &c. of another; in which case that other must by necessary implication take, as the intention of the testator is expressed that his heir shall not have the estate till the event has happened. But here in the events which have occurred, the leasehold in question will fall into the residue as undisposed of. And he referred to *Rayman* v. *Gold* (*b*), and *Horton* v. *Horton* (*c*).

East, contrà, mentioned the case of *Roe d. Bendall* v. *Sommerset* (*d*) as in point, which called in question the two last mentioned cases; and also referred to the opinion of *Croke* J. in *Roberts* v. *Roberts* (*e*). But he was not called upon to argue the case;

The Court being clearly of opinion with the defendant.

And Ld. ELLENBOROUGH C. J. said, We are glad to find ourselves warranted by authority in putting a construction upon the words of the will which it was manifestly the intention of the testator to express in favour of his grandson *Thomas*. For he first leaves the estate to his son *Richard*, the father of *Thomas*, until his eldest son

(*a*) 3 *Burr.* 1634. (*b*) *Moore*, 635. (*c*) *Cro Jac.* 74.
(*d*) 5 *Burr.* 2608. and 2 *Blac. Rep.* 692.
(*e*) 2 *Bulstr.* (123) 113 and vide *Goodright* v. *Goodridge*, *Willes*, 369. and *Cosen*'s case, *Owen*, 29.

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Thomas comes of age: and in the event of *Thomas* dying in his minority, he gives it to his younger brothers. But he desires that the premises may be *quitted and delivered up, as aforesaid*, by his son *Richard*; that is, when *Richard*'s son *Thomas* came of age, to *Thomas*; for to whom else could *Richard* deliver up the possession in that event? and if *Richard* did what by the will he was directed to do, and which he is found to have done, the bequest of *Roskief* was confirmed to his family. To be sure there is a strong implication from the words of the will that the testator meant that *Thomas* should have *Roskief* when he came of age, though it is not so expressed in terms: and the the authorities bear out this construction.

Per Curiam, Judgment of nonsuit to be entered.

Friday, *Feb.* 8th.

SOULSBY *against* NEVING.

After a landlord has recovered in ejectment against his tenant, he may maintain debt upon the stat. 4 *Geo.* 2. *c.* 28. for double the yearly value of the premises, during the time the tenant held over after the expiration of the landlord's notice to quit.

THE defendant, after having held of the plaintiff a farm at *Hallington* in *Northumberland* for 14 years, received a regular notice to quit on the 12th of *May* 1806, and the possession was then demanded of him; but he refused to deliver it up, and held over till the 7th of *Feb.* 1807; whereupon the plaintiff brought his ejectment against the defendant, and recovered possession; and afterwards brought this action of debt (*a*) upon the statute 4 *Geo.* 2.

(*a*) The declaration was in the usual form; alleging the demise to and holding by the defendant; the demand of possession and notice in writing to deliver up the premises at the end of the term, on the 12th of *May* 1806; the subsequent refusal of the defendant, and his wilfully holding over for three quarters of a year after the 12th of *May*; and the annual value of the premises. Vide *Cobb* v. *Stokes*, 8 *East*, 358.

c. 28.

c. 28. for *double the yearly value* of the premifes in the interval between the expiration of the notice to quit, (which was the day of the demife in the ejectment), and the time of recovering poffeffion under the ejectment. And thefe facts being proved at the trial at *Appleby* before *Chambre* J., it was objected on the part of the defendant, that the plaintiff having before recovered the premifes by ejectment, and thereby treated the defendant as a *trefpaffer*, this action of debt upon the ftatute, in which, as it was faid, the defendant was proceeded againft as *tenant*, could not be maintained: the learned judge, however, overruled the objection, and the jury gave a verdict for 440*l.* as for the proportion of the double yearly value: the defendant having leave to move the Court to enter a nonfuit, if the direction were wrong. A rule nifi for this purpofe was obtained in *Michaelmas* term laft, againft which

Park and *Burrel* now fhewed caufe, and obferved that the ground laid for obtaining the rule was that after the plaintiff had recovered in the ejectment againft the defendant, and thereby treated him as a trefpaffer, it was not competent to him to bring the prefent action; which was ftated to be founded on contract, and in which the relation of landlord and tenant was recognized: but this they denied; and contended that the double value given to the landlord by the ftatute 4 *Geo.* 2. *c.* 28. upon the wilful holding over of a tenant after due notice was by way of *penalty*, and fo it was noticed in the ftatute, confidering the tenant as a wrong-doer; and therefore not inconfiftent with the action of ejectment in which the recovery was had againft him as a trefpaffer. In this action the demand was not as for *rent*, but for the double

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value of the premises wrongfully held over. The statute of the 4 *Geo.* 2. is differently worded (*a*) from that of the 11 *Geo.* 2. *c.* 19. *s.* 18. upon the same subject, and which latter directs that if a tenant, after giving notice to his landlord to quit, hold over, he shall pay double *rent*. This the Legislature thought sufficient when the landlord is satisfied with the continuance of the tenant, but the notice to quit proceeds only from the tenant. But where the tenant wilfully holds over against the landlord's notice to quit, the Legislature by the former statute have given the *double value*, by way of *penalty*, and not as *rent*; for in many instances the double *rent* would be no compensation to the landlord, for being kept out of possession of the land, and it might still be advantageous to the tenant to hold over at that rate. As to the case of *Wright* v *Smith* (*b*), it was clearly not determined, as stated in the marginal note of the report, on the ground that the action for the double value did not lie after a recovery by the landlord in ejectment; but on the ground that the statute, which was meant to give a *penalty* against the contumacy of tenants, did not extend to a case where, without fraud or contumacy, the tenant had held over upon the faith of a lease granted bonâ fide under a power, which turned out to be invalid.

Raine and *Hullock*, in support of the rule, contended that the Legislature by the stat. 4 *Geo.* 2. only meant to give the landlord an election either to consider the tenancy as continuing, and to recover the proportion of double the annual value by way of rent; or considering

(*a*) *Timmins* v. *Rawlinson*, 3 *Burr.* 1603.

(*b*) Exchequer, *Easter* term 1805, reported in 5 *Esp. Ni. Pri. Cas.* 203.

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the tenancy at an end, and the tenant a treſpaſſer, to proceed by ejectment, and the ſubſequent action for the meſne profits; and in *Cutting* v. *Derby* (*a*) the Court conſidered this action as ſtanding in the place of an ejectment. But this is an attempt to confound the two remedies, and to recover double the yearly value of the farm as upon a continuing implied tenancy, after having treated the tenant as a treſpaſſer during the ſame period, and ejected him upon that ground. If the ſtatute had ever been conſidered as ſubſtituting this remedy in the place of the action for meſne profits, recourſe would always have been had to it, as the more beneficial remedy for the landlord; and the abſence of all precedent to warrant it after a recovery in ejectment affords a ſtrong argument againſt it. Though, in one ſenſe, the giving the double value was meant to operate as a penalty, yet it is not ſtrictly ſo; for by the ſtatute the tenant may be held to bail for the amount; which is never allowed in penal actions. The count in debt for the double value may be joined with other counts upon contracts.

Lord ELLENBOROUGH C. J. There is no incongruity in the landlord's bringing this action for the double value after a recovery in ejectment: and the deciſion of the Court of Exchequer in *Wright* v. *Smith* evidently proceeded on the ground that the ſtatute 4 *Geo.* 2. only meant to apply to the caſe of a wilful and contumacious holding over by the tenant, after notice to quit, and not to a bona fide holding over by miſtake. The Legiſlature conſidered that the ſingle value might not in many caſes be a compenſation to the landlord for having been kept

(*a*) 2 *Blac. Rep.* 12

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out of possession by the misconduct of the tenant, and therefore they gave him double the value. It has no reference to any antecedent remedy which the landlord had to recover possession by ejectment, but is cumulative. The two actions are brought diverso intuitu: the ejectment is in order to get possession of the premises wrongfully withheld; the action of debt for the double value is in order to indemnify the landlord for the wrong. Then came the statute 11 *Geo.* 2. *c.* 19., in which, where the tenant gives the notice to quit, and still holds over, the Legislature thought it was sufficient to give the landlord double rent, to be levied, sued for, and recovered in the same manner as the single rent was; giving the landlord therefore a right to distrain for it, which is a remedy applicable only to the relation of landlord and tenant. And the same statute recognizes the party by the name of tenant, which the first statute does not. Upon the latter statute, therefore, there may be some incongruity in applying the remedy for double rent after the remedy by ejectment, which treats the person in possession as a trespasser; but there is no incongruity in this case. And as to the form of this action being in debt; that is not confined to cases of contract; for it is the form in which penalties on the game laws, &c. are recovered.

The other Judges agreed that there was no inconsistency in bringing this action after the recovery in ejectment: and *Lawrence* J. referred to Lord *Mansfield*'s opinion in *Doe d. Cheney* v. *Batten* (a), which seemed to import as much.

Rule discharged.

(a) *Cowp.* 245. The printed report inadvertently speaks of the landlord's being entitled to double *rent* by the stat. 4 *Geo.* 2. *c.* 28., instead of

of double *value*: with this correction the passage will apply more strongly. I have a MS. note of the same case by Mr Justice *Buller* in which Lord *Mansfield* is made to say, "If both parties intended" (*i. e* by the landlord's receipt of the single rent for a quarter which became due after the time of the demise laid in the declaration;) "that the tenant should continue in possession, there is an end of the plaintiff's title: but if not; if it were meant merely by both that the landlord should only take the rent instead of the *double penalty*, that would not bar his remedy by ejectment " The same inadvertency, however, which has been noticed in the printed report seems afterwards to have occurred in the MS., which runs thus: (by Lord *Mansfield*) "There was another case at *Launceston*, when Mr. Justice *Gould* was at the bar, where an objection was taken that the plaintiff had brought an action for use and "occupation for rent accruing due after the time of the demise, and which action then stood ready for trial: and it was said that that was an action founded on promises on a supposed permission of the plaintiff to occupy, which was a waver of the notice. But the objection was overruled; and the plaintiff recovered in the ejectment, and afterwards in the action for use and occupation. And it was holden that one of the remedies was not a waver of the other. Why? Because they were brought for several demands, to both of which the plaintiff was entitled: and one did not wave the other, *because after the possession was recovered, the plaintiff had a right to double* rent, *if he had thought fit to sue for it.*" I suspect that by the "double *rent*" here spoken of was meant double *value*; for the act of the 4 *Geo.* 2. is specifically referred to in other parts of the case, and no mention made of the 11 *Geo.* 2: and with that alteration (which is besides confirmed by what fell from the Court in the case in judgment) this opinion is an authority in point.

1808.

Wednesday, Feb. 10th.

BRASWELL *against* JECO.

Order to amend writs of scire facias on a judgment, and declaration thereon, conformably to the judgment roll.

THE Court, after hearing *Lawes* against a rule obtained by *Espinasse*, directed the two writs of scire facias issued upon a judgment (*a*), and the declaration in scire facias thereon, to be amended, by stating the judgment and proceedings in the original action to have been against the defendant as a common person, and not as an attorney, conformably to the judgment roll.

Rule absolute (*b*).

(*a*) In drawing up the rule nisi the judgment was improperly stated to be signed *in this cause*; but as no judgment had been signed in the cause now before the Court, those words were rejected as superfluous.

(*b*) Vide *Perkins, Administrator*, v. *Petit*, 2 *Bos. & Pull.* 275. and the cases there cited.

The KING *against* The Sheriff of LONDON.

The sheriff cannot relieve himself from an attachment for not bringing in the body, by payment of the debt sworn to and indorsed on the bailable writ since the stat. 43 G. 3. c. 46. s. 2., having neglected to take the money at the time of the arrest as directed by that act; but must pay the whole debt and costs.

THE defendant in the original action was arrested on bailable process indorsed for 60*l*., and was liberated without giving any bail bond, or paying the debt sworn to and costs into the hands of the sheriff under the stat. 43 *Geo.* 3. *c.* 46. *s.* 2.: and bail not having justified in time, and the sheriff being attached, a rule was obtained on a former day, calling on the plaintiff in the original action to shew cause why the writ of attachment should not be set aside with costs, upon payment of the sum sworn to and indorsed on the writ, with costs up to the time when the same was tendered by the sheriff; which tender

 was

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was made before the attachment. And in ſupport of this rule *Gurney* relied on the late ſtatute, which enabled a party arreſted on meſne proceſs, in lieu of giving bail to the ſheriff, to depoſit in his hands the amount of the debt ſworn to and indorſed on the writ, together with 10*l*. to anſwer the coſts then incurred; on payment of which the party arreſted is to be diſcharged. This ſum the ſheriff is directed to pay into Court at or before the return of the writ; and if the defendant do not put in and perfect bail, the money is to be paid over to the plaintiff. This rule, he contended, was calculated to put the plaintiff in the ſame condition as he would have been in if the money had been originally paid to the ſheriff. But,

Garrow contrà, objected that the ſheriff, not having done his duty in the firſt inſtance by taking the amount of the debt ſworn to and coſts, as directed by the ſtat. 43 *Geo.* 3. *c.* 46. ſtood in the ſame ſituation of delinquency, as he would have done before that ſtatute by liberating the party arreſted without taking a bail bond; and in that caſe the Court never relieved the ſheriff from an attachment regularly obtained, unleſs upon the terms of paying the whole debt (*a*) and coſts. And he ſuggeſted that the plaintiff's demand was for 150*l*.

And of this opinion were *the Court*, who referred it to the Maſter to ſee what was due to the plaintiff, and directed the attachment to ſtand as a ſecurity for what the Maſter ſhould find to be due and for the coſts.

(*a*) He referred to *Rex* v. *The Sheriff of Surrey*, 7 *Term Rep*. 239. and *Heppel* v. *King*, *ib*. 370.

Wednesday, Feb. 10th.

The KING *against* DAVIS.

In the Cause of *Morrow* against *Davis.*

The costs of a suit in Chancery directed to be paid by an award made before the bankruptcy of the defendant, but which costs were not taxed till after he became bankrupt, cannot be proved under the commission, but the bankrupt remains liable to be attached for the amount under the award made a rule of Court.

ON the 10th of *March* 1807, the plaintiff and defendant in the action entered into arbitration bonds for 500*l.* which, reciting that a bill in Chancery had been filed against the defendant at the suit of the plaintiff concerning a partnership account between the defendant and the plaintiff's late husband, on which certain proceedings were had, and that a considerable sum was claimed to be due to the plaintiff, and that to ascertain the balance, it was agreed to refer the matter to an arbitrator; were conditioned to abide by and perform the award concerning all matters and differences between the parties, and all costs incurred by such suit, so that the award should be ready to be delivered before the 1st of *May* next. The arbitrator on the 30th of *April* awarded 205*l.* to be paid to the plaintiff *on the 30th of May*, as the balance due on the account, and a moiety of the expences of the award, and that the defendant should pay all *the costs and charges of the suit in Chancery.* On the 14th of *May* the defendant became bankrupt, and a commission issued against him; and the commissioners allowed the debt awarded to be proved under the commission, but not the costs of the suit in Chancery, which were not then ascertained. The defendant obtained his certificate on the 13th of *January* 1808, and having refused to pay those costs, an attachment was sued out against him for non-performance of the award, which had been made a rule of Court.

Park,

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The KING *against* DAVIS.

Park now ſhewed cauſe againſt a rule for diſcharging the defendant from the attachment; and contended at firſt that a debt awarded to be paid on a future day after the bankruptcy was not proveable under the commiſſion, and therefore the defendant remained perſonally liable to pay it. That the ſtat. 7 *Geo.* 1. *c.* 31., enabling debts on certain ſecurities due at a future day to be proved under the commiſſion, did not help the caſe, as that related only to certain inſtruments or other perſonal ſecurities; and an award was not named amongſt them. In *Baker*'s caſe (*a*) the ſum awarded was due before the bankruptcy, and of courſe the bankrupt was entitled to his diſcharge by the certificate. (As to the debt, *the Court* obſerved, that it was clearly due before the bankruptcy; the award only aſcertained the exact amount of it. The only queſtion was as to the coſts.) He then contended that at any rate the attachment muſt ſtand for the amount of the coſts of the ſuit in equity, which are only conſtituted a debt by the taxation, and are not proveable under the commiſſion, though the order for taxation were made before the bankruptcy; according to the caſe *Ex parte Sneaps* (*b*), on which he relied.

Littledale, contrà, as to the debt, ſaid that it exiſted before the arbitration bonds were entered into: and not only did the bonds recite that a balance was claimed to be due to the plaintiff, the amount of which the arbitrator was to aſcertain; but alſo that coſts had been incurred in the ſuit in Chancery, the payment of which he was to regulate. When therefore the coſts were awarded to be

(*a*) 2 *Stra.* 1152. (*b*) *Co. Bank. Law*, 192 *Cull. B. L.* 107.

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The KING *against* DAVIS.

paid by the defendant, they became a debt due under the arbitration bond executed by him, for which the penalty was a ſecurity before the bankruptcy; in like manner as if the preciſe amount had been incorporated into the bond. Where authority is given by one inſtrument to do an act, which is afterwards done, it is the ſame as if the particular act were directed to be done by the original inſtrument (*a*). In *Pattiſon* v. *Bankes* (*b*) a bond for payment of an annuity for a term of years was held to be within the ſtat. 7 *Geo.* 1. *c.* 31. though the penalty were not forfeited at the time of the bankruptcy. And as a verdict given before the bankruptcy attaches to it the coſts, though not taxed till afterwards; ſo here the award having aſcertained the right to the coſts in equity before the bankruptcy, they will follow the debt awarded in the ſame manner, though not taxed; and are conſequently proveable under the commiſſion when aſcertained.

The Court inquired whether the caſe *Ex parte Sneaps* had ever been overruled; and being anſwered that it had not, and that the practice ſince that deciſion had always been in conformity to it: Lord *Ellenborough* obſerved that no argument could put the award of the arbitrator higher than the order of the Court of Chancery itſelf: and Lord *Thurlow* having in that caſe held that the coſts taxed after the bankruptcy were not inchoate with the order for taxation made before, this Court could not conſider them as inchoate with the award. Thereupon

(*a*) *Johnſon* v. *Hodgson*, 8 *Eaſt*, 38.   (*b*) *Cowp.* 540.

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The Court directed, that on payment by the defendant of the costs in the Chancery suit directed to be paid by the award, he should be discharged from the attachment.

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The KING *against* DAVIS.

VANBRYNEN and Others *against* WILSON.

Thursday, Feb 11th.

The Court would not stay judgment and execution, on a summary application, because the plaintiffs after verdict became alien enemies.

THIS cause had been referred by an order at nisi prius to an arbitrator to assess the plaintiff's damages; which he had done, and the verdict was entered for the sum awarded; and after an ineffectual attempt on the part of the defendant to impeach the propriety of the arbitrator's calculation, upon a rule which was discussed on a former day in this term and discharged; *Richardson* now moved that judgment and execution should be stayed on bringing the money recovered by the verdict into Court, if the Court should think that necessary; upon the ground that the plaintiffs had since the verdict become alien enemies. And being asked by the Court, if he had any case to cite where they had so interfered in a summary way; he answered in the negative: but said that in all cases where an audita querela would lie, the Court were now in the practice of giving summary relief, to avoid the expence of that mode of proceeding (*a*).

The Court, however, said that if the defendant had any such remedy by law, he might avail himself of it, if so advised; but that they would not interfere in the manner proposed, on such an occasion.

Rule refused.

(*a*) Vide *Anon.* 1 *Salk.* 93.

Thursday, Feb. 11th.

COLLINS *against* PONEY.

In trefpafs againft the owner of a houfe adjoining to the plaintiff's in the metropolis for taking down his party-wall and building on it, the defendant fhewing at the trial that he was authorized in doing the thing complained of under the building act 14 *G.* 3. *c.* 78. is entitled to treble cofts under the 100th fection, upon a nonfuit.

THE plaintiff brought trefpafs againft his neighbour for taking down a portion of his party-wall between their two houfes in the metropolis, and building upon it; but it appearing that the defendant was authorized in what he had done by the provifions of the building act, 14 *Geo.* 3. *c.* 78., the plaintiff was nonfuited. And the defendant then obtained a rule calling on the plaintiff to fhew caufe why a fuggeftion fhould not be entered on the roll, that this action was brought for acts done in purfuance of the ftatute; and why the mafter fhould not tax the defendant his treble cofts of the action and the cofts of this application.

Garrow and *Manley* now fhewed caufe, and contended that the 100th fection of the act, which gives treble cofts to the defendant if a verdict be given for him or the plaintiff be nonfuited in any action brought "for any thing done in purfuance of the act," was only intended to protect juftices of the peace or other public officers, who did any thing by virtue of their offices in the execution of the act; though the words of the claufe are general, that "no action fhall be commenced againft "*any perfon or perfons*, for any thing done in purfuance of "this act," &c.: and it does not extend to private perfons, like the defendant, who take on themfelves to do the act complained of. The firft forty fections of the act regulate the mode of building party walls, and point out

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COLLINS *against* PUNLY.

out the manner of settling differences in the progress of it. The 41st section regulates the proportion which the owner of the adjoining house, deriving benefit from a party-wall when built, shall pay towards the expence of it; and gives an action to recover it, if it be not paid, with *double* costs of suit to the plaintiff, if he recover the full sum claimed. Now there could be no reason for giving a plaintiff, when he sued rightfully for that which the act entitled him to, a less rate of costs than was given to a defendant if wrongfully sued for any thing done under the same act; which shews that the 100th clause was meant to apply to a different description of persons. Then follow some further regulations as to building from the 41st to the 61st sections inclusive. By the 62d section surveyors are to be appointed, whose duties are pointed out. and jurisdiction is given to justices of peace for the recovery of penalties by various subsequent clauses: and by section 87. distresses are not to be avoided for want of form: and by section 88. no action shall lie for any irregularity, if tender of sufficient amends be first made. And it was to protect the justices and other subordinate officers who were required to do certain acts in the execution of the duties imposed on them, that the provision for treble costs was made in the 100th section.

The Attorney-General, *Park*, and *Marryat*, contrà, insisted upon the general wording of the 100th clause, which extended to cover *any* person for *any thing done in pursuance of the act*; and therefore included this defendant, though neither magistrate nor surveyor. If the Legislature had intended to confine the protection to public officers,

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COLLINS *against* PONSY.

officers, it would have ufed the fame appropriate words of defcription as are to be found in other acts having fuch perfons in view. The defendant would have been a trefpaffer, unlefs for the protection of the act: and if inftead of pleading the general iffue, (which is only given by the 100th claufe) he had pleaded fpecially, that what he did was done in purfuance of the act, it muft have been found for him: for if not fo done, there muft have been a verdict for the plaintiff.

The majority of *The Court* agreed that the words of the 100th claufe were too general and ftrong to be gotten over: and therefore confidered this cafe as falling within it, efpecially as the fame claufe gives the plea of the general iffue to any defendant fued for any matter or thing done in purfuance and by the authority of the act, by which alone the defendant could juftify what he had done.

LE BLANC J., who thought that the cafe was not within the intention of the Legiflature in framing that claufe, admitted that he felt himfelf hampered by the general words of it.

1808.

REGULA GENERALIS.

Hilary Term, 48 *Geo.* 3. 1808.

IT IS ORDERED, That from and after the laſt day of this preſent *Hilary* term, no perſon be held to ſpecial bail in an action of trover or detinue, without an order made for that purpoſe by the Lord Chief Juſtice, or one of the Judges of this court. Special bail in trover.

ANDREWS *againſt* PALSGRAVE.

Friday, Feb. 12th.

In a ſpecial count on a policy, the riſk was ſtated to continue until the ſhip was unloaded, and there were common counts: held that the premium having been paid into court generally was an admiſſion of the contract ſtated in the ſpecial count; and that it was not competent to the defendant to ſhew that the policy by which the riſk was originally made to ceaſe after the ſhip was moored 24 hours in ſafety was afterwards altered by the broker without the defendant's knowledge. But the defendant having afterwards obtained a rule to amend the rule for paying money into court, by confining it to the money counts, and for a new trial on payment of coſts; and the plaintiff thereupon determining to take the money out of court, and not to proceed further, is entitled to all the coſts of the action, and not merely to the uſual coſts of a new trial.

THE declaration contained a ſpecial count on a loſs by barratry, on a policy of inſurance on the ſhip *Mercurius*, at and from *London* to *Tobago*, continuing the riſk until the ſhip was unloaded; and alſo the common counts. The defendant paid the premium into court generally; and at the trial offered to prove that by the original terms of the inſurance agreed to by the underwriters the riſk was only to continue for 24 hours, and that it was afterwards altered by the broker without their knowledge. But Lord *Ellenborough* C. J. held that the payment of money into court generally was an admiſſion

of

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ANDREWS against PALSGRAVE.

of the policy as ſtated in the declaration; and the plaintiff had a verdict. The next cauſe in the paper at the ſittings was by the ſame plaintiff againſt *Smart*, another underwriter on the ſame policy; in which the premium had been paid into court upon the count for money had and received: and the broker proving the alteration to have been made, as above ſtated, the plaintiff was nonſuited. The defendant *Palſgrave* in laſt *Michaelmas* term obtained a rule to amend his former rule for paying money into court, by confining it to the count for money had and received; and alſo for a new trial on payment of coſts: upon which the plaintiff determined not to proceed to a new trial, but to take the money out of court; and upon the taxation of coſts contended before the Maſter that he was entitled to the whole coſts of the action: but having admitted, in anſwer to the Maſter's inquiry, that he ſhould have ſtill proceeded to trial, though the premium had been paid into court on the common count alone, the Maſter allowed only the uſual coſts on a rule for a new trial.

Garrow, *Park*, and *Boſanquet* now ſhewed cauſe againſt a rule obtained on a former day for the Maſter to review his taxation; inſiſting that it was right; or that at any rate, if the plaintiff were entitled to more, it could only be the coſts up to the time of the original payment of money into court. But

The Court (ſtopping *The Attorney-General* and *Gaſelee* in ſupport of the rule) ſaid that when the defendant applied to amend the rule for paying money into court,

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he applied for a favour, which he could only have upon the terms of paying all the cofts incurred fince the original rule; and that the plaintiff was by the terms of the original rule entitled to the cofts of the action if he took out the money. They therefore made the rule abfolute to review the taxation.

1808.

ANDREWS *againft* PALSGRAVE.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED 1808.

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Forty-eighth Year of the Reign of GEORGE III.

MEMORANDUM.

IN the course of the last Vacation Sir *Giles Rooke*, Knt., one of the Judges of the Court of Common Pleas, died; and was succeeded by Mr. Justice *Lawrence*, who resigned his seat on the Bench of this Court. And in this Term *John Bayley*, Esq. Serjeant at Law, was appointed a Judge of this Court, and on *Monday* the 9th of *May* took his seat on the Bench, and was afterwards knighted.

1808.

Thursday, May 5th.

By the long established and recognized practice of the court a writ of capias, with a *non omittas* clause, may issue in the first instance, and be executed by the sheriff within a particular liberty, (such as the honor of *Pontefract* in the county of *York*) the bailiff of which has the execution and return of writs, without a prior writ of latitat first issued, and a return made by the sheriff of mandavi ballivo qui nullum dedit responsum: and therefore no action on the case lies by the bailiff of such liberty against the party suing out such writ, upon an allegation that it was *wrongfully, injuriously, and deceitfully* caused to be issued by him to the damage of the bailiff in his office, &c.

Carrett *against* Smallpage and Others.

In an action on the case for an injury to the plaintiff, as bailiff of a franchise, the first count of the declaration stated, in substance, that the liberty and franchise of the honor of *Pontefract* in the county of *York*, from time immemorial, had *the return of writs*, and an office of bailiff, and that the bailiff of right ought to have within the same the execution and return of *all* and singular writs, precepts, and process, of all and singular the courts, justices, commissioners, and escheators of the king and his predecessors, with divers fees, &c. arising therefrom: which office during all that time has been granted and grantable by the person for the time being seised of the said liberty, &c. That no sheriff of the county of *York* ought to be commanded by virtue of any writ (*a*) issuing out of *B. R.* that he should not omit by reason of any liberty in his (the sheriff's) bailiwick, but that he should enter and take the person in such writ named, if he should be found within the same, to answer, &c. unless a common latitat writ should first have issued out of the same court, commanding such sheriff to take the same person if he should be found in his (the sheriff's) bailiwick, and he should have returned, that he had made his mandate to the bailiff of the said liberty to arrest such person named in the said writ, to which the said bailiff had not given any answer. The count then stated that the king on the 13th of *July* 1801 was and still is seised in right of his duchy of *Lancaster* of the said liberty, &c. of *Pontefract*, and that by indenture of that date

(*a*) i. e. a special non omittas capias ad respondendum writ.

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CARRETT *against* SMALLPAGE and Others.

he granted and demiſed to the plaintiff the office of bailiff of the liberty, and the execution and return of *all* and ſingular writs, &c. (as before) with all and every the fees, &c. ariſing therefrom, habendum for 31 years at a certain rent; which indenture was inrolled, &c.; by virtue of which the plaintiff became bailiff of the ſaid liberty, and ſtill is in poſſeſſion of the ſaid office of bailiff, and has the execution of all and ſingular ſuch writs, precepts, and proceſs, within the ſaid honor, &c. and by reaſon thereof lawfully entitled to all and every the fees, &c.: yet that the defendants well knowing the premiſes, and that no writ of latitat at the ſuit of the defendant *Smallpage* againſt *M. Dormer* had firſt iſſued out of *B. R.* to the ſheriff of *Yorkſhire*; but intending to prejudice and aggrieve the plaintiff, as ſuch bailiff, and to deprive him of the fees, &c. of his ſaid office; afterwards, on the 23d of *July* 1806, *wrongfully, injuriouſly, and deceitfully cauſed and procured* to be iſſued out of *B. R.* againſt the ſaid *M. D.* a certain writ of the king called a non omittas capias (*a*), teſted the 25th of *June* in *Trinity* term then laſt paſt, according to the uſage and practice of the ſaid court, directed to the ſheriff of *Yorkſhire*, by which he was commanded that he ſhould not omit by reaſon of *any* liberty in his bailiwick, but that he ſhould enter the *ſame*, and take the ſaid *M. D.* &c., to anſwer to the defendant (*Smallpage*) of a plea of treſpaſs, &c. according to the cuſtom of the ſaid court of *B. R.* &c.; which ſaid writ of non omittas capias the defendants afterwards and before the return thereof, viz. on the 30th of *July* 1806, *wrongfully, injuriouſly, and deceitfully* cauſed to be delivered to the ſheriff of *Yorkſhire* to be executed; by

(*a*) This was incorrectly called a non omittas latitat writ in the declaration.

Z virtue

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CARRETT *against* SMALLPAGE and Others.

virtue of which writ the said sheriff, without the licence and against the will of the plaintiff, afterwards, and before the return thereof, to wit, on the 9th of *August* 1806, entered into the plaintiff's said liberty, and caused the said *M. D.* to be taken within the plaintiff's said liberty, to answer to the defendant *Smallpage* according to the exigency of such writ: whereby the plaintiff lost and was deprived of divers fees, &c. which would have accrued and of right belonged to him as such bailiff if he had been commanded to take the said *M. D.*, and had caused him to be taken within his said liberty to answer, &c. The 2d count stated that the plaintiff was lawfully possessed of the office of bailiff of the said liberty, &c. and lawfully entitled to the execution of *all* writs, &c. *for the taking* of any defendant at the suit of any person in any action issuing out of *B. R.* to be executed within the said liberty, and to all fees, &c. arising therefrom, unless a return should have been made to the court by the sheriff, &c. upon a former writ issued out of the same court, at the suit of such person, against such defendant, to warrant the issuing of a special writ called a non omittas, commanding such sheriff, &c.: yet that the defendants well knowing the premises, and that no return had been made to *B. R.* upon any writ issued out of the same court at the suit of the said defendant *Smallpage* against *M. D.* by any sheriff of *Y.* to warrant the issuing of such special non omittas writ; but intending to prejudice and aggrieve the plaintiff as such bailiff, and to deprive him of his fees, &c. on the 28th of *July* 1806 *wrongfully, injuriously, and deceitfully* caused and procured to be issued out of *B. R.* a non omittas capias writ, &c. (as before.) Plea, the general issue.

The

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CARRETT *against* SMALLPAGE and Others.

The cause was tried before *Chambre* J. at *York*, and on the part of the plaintiff several charters* made in the reigns of *Ed.* 3. and *Hen.* 4. were read from an ancient book belonging to the duchy of *Lancaster*, called the Great Coucher Book, to prove the immemorial existence of the liberty, and the title of the crown to it, as part of the duchy. The grant of the office to the plaintiff was also proved, reciting a former grant to *Robert Parker*; and four counterparts of leases were produced in 1749, (reciting one in 1704) 1756, 1765, and the last in 1786 to *Parker*: all which corresponded with the plaintiff's lease, as set forth in the declaration, in the description of the office, and of the execution and return of writs, &c. The execution of the office was proved by bail bonds taken in the name of the chief bailiff of the liberty for the time being from 1738 downwards; by mandates from the sheriff as far back as 1765; and by parol testimony of the execution of many such mandates every year in other liberties in the county as well as in the liberty in question. But most of the witnesses also proved, upon cross-examination, a very general practice to issue and execute writs of non omittas capias within the liberty in the first instance. It also appeared that there was a prison within the liberty kept up by the chief bailiff, whose fee upon an arrest was one guinea. That the writ in question was executed within the liberty; and that the defendant's attorney declared that he had issued the non omittas in the first instance purposely to try the right, and that he would indemnify the defendant and his agent. It was then objected on the part of the defendant, that the plaintiff had failed in proving his exclusive right to the execution and return of *all* writs, &c. in the extent in which it was averred in the declaration; and the opinion of Lord

* Charters read from an ancient book of the duchy of *Lancaster*.

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Hale in the case of Sir *Robert Atkyns* v. *Clare*, 1 *Ventris*, 406. was referred to, shewing certain writs which the sheriff might execute within a liberty: and on this objection the plaintiff was nonsuited.

Park, *Topping*, and *Holroyd*, in last *Michaelmas* term, shewed cause against the rule for setting aside the nonsuit; insisting that the allegation in the declaration, that the bailiff in the said liberty had the execution and return of *all* writs, &c. within the same, was material, and was laid too largely; inasmuch as there were several exceptions known to the law, and recognized in the books; such as writs of quo minus out of the Exchequer (*a*), writs of waste (*b*), of deliverance by replevin (*c*), of redisseisin (*d*), of all writs to which the King is party (*e*), or to which the bailiff of the particular franchise is himself a party (*f*); so of writs of inquiry (*g*), and of distringas juratores (*h*); all of which must be executed and returned by the sheriff to whom they are directed, whether within liberties or without. [Lord *Ellenborough* C. J. observed that in the case of Sir *Robert Atkyns* v. *Clare*, in *Vidian's Entries* 55. the declaration was in the same general form as this; and no such objection was taken; though, as it appears from the report in *Ventris*, that case was very much canvassed and contested. And he asked whether the general allegation of the bailiff's having the execution and return of *all* writs, &c. must not be under-

(*a*) Sir *Robert Atkyns* v. *Clare*, 1 *Ventr*. 399 406.

(*b*) *Ibid* and stat. 13 *Ed*. 1. *c*. 14.

(*c*) Stat. *Westm*. 1. *c*. 17. *Gilb. Hist. of C. B*. 28. (*d*) *Ibid*.

(*e*) *Plowd* 216. 243. 5 *Co*. 91. *b*. 92.

(*f*) By analogy to the rule of the common law in like cases.

(*g*) 5 *Com Dig*. *Retorn*. D. 3. cites *Hob*. 83.

(*h*) *Ibid*. and 19 *H*. 6. 67. *a*.

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ftood of all writs whereof fuch bailiffs may have the return by law.] To this they anfwered that the bailiff of this franchife might have had the return of *all* writs by private act of parliament; and after verdict it would have been taken that he had proved his allegation by any mean by which it could have been proved. But fuppofing the allegation to be confined to all writs returnable by bailiffs, ftill the claim would be laid too largely; for the plaintiff claims that no non omittas writ fhould iffue into his bailiwick until he himfelf has made default to the fheriff's mandate; whereas it is clear that it may, even according to the more ancient practice of this Court, if the bailiff of any other liberty within the county have received the fheriff's mandate and made no return.

But if the nonfuit could not be fuftained on this ground; ftill they contended that the Court would not fend the caufe to a new trial, if, on principle, the action were not maintainable. And they urged that the practice of the Court, which had exifted at leaft fince the year 1739, of iffuing non omittas writs in the firft inftance, had fanctioned the right to do it, at leaft fo far as to fecure the party fuing out fuch a writ, according to the cuftom of the Court, from anfwering for it as a wrong doer. In 1739 the bifhop of *Ely* put up a notice in the K. B. office (*a*), warning the officers of the Court againft iffuing non omittas writs into his franchife of *Ely*, without firft iffuing previous procefs to warrant the fame; on which a mandavi ballivo was returned by the fheriff and filed; and threatening with an action any officer who did the like again: but in fact no action was brought, though the practice continued as before. It was always confidered (*b*) that if a fieri facias or capias were awarded to

(*a*) Vide *Rules and Orders of K. B. Trin.* 1739. (*b*) *Co.* 92.

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the sheriff, and he made his mandate to the bailiff of a liberty having return of writs, who made no answer, another writ might issue to the sheriff with a clause of non omittas propter aliquam libertatem, by virtue of which he might seize the goods or arrest the body of the debtor not only within that liberty the bailiff of which had made default to the mandavi ballivo, but also within any other liberty in the county; though the bailiff of such other liberty had made no such default. The same is stated to have been practised in K. B. in *Gilbert's Hist. of C. B.* 29.: though in C. B. it is otherwise; for there the non omittas process recites the common capias, and the sheriff's return of mandavi ballivo qui nullum dedit responsum, and then it empowers the sheriff to enter that liberty. The practice, however, of issuing the non omittas process in the first instance, has been long established, and is recognized in all the modern books of practice (*a*); and was lately confirmed by the Court (*b*), upon an application by the bailiff of this very liberty to restrain the issuing of non omittas writs in the first instance; which was refused: and such practice, being in furtherance of justice and to prevent delay, ought not now to be overturned after the experience of near a century in its favour. The issuing of the writ is in some respect the act of the Court, though at the suggestion of the party; and if it were irregularly issued, the party grieved should rather have applied to the Court to quash it, quia improvide emanavit, than bring an action against the party who sued it out, thereby treating him as a wrong doer. For at least the process is legal, otherwise the party arrested under it might maintain trespass; which clearly he cannot do. It is not a void process, like a testatum writ issued without a prior writ to warrant it,

(*a*) Vide 1 *Tidd's Pract. ch.* 4. *Imp. New Instr. Cler.* 7th edit. 178. *Lilly's Pract. Reg.* tit. *Non Omittas.* (*b*) Vide the next page.

it, which would make the party executing it a trefpaffer; though the Court on application in fuch a cafe would afterwards order fuch prior writ to iffue antedated, in order to authorife the teftatum writ.

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Lord ELLENBOROUGH C. J. at the conclufion of the argument of the defendant's counfel on fhewing caufe in the laft term, addreffing himfelf to the plaintiff's counfel upon this laft ground of objection, faid, If this action can be maintained, I fee no reafon why an action may not lie againft a party for iffuing a writ of latitat without a prior bill of *Middlefex* to warrant it; for what elfe but the practice of the Court has made the latitat iffuable in the firft inftance: but time has run upon the one practice and the other, and has legitimated them both. The cafe of the latitat is even ftronger than this of the non omittas writ; for that contains a fuggeftion of facts which are not true, namely, the iffuing of the former procefs, and its return, &c. The mafter has furnifhed us with his note of what paffed on the application to this Court, in *Mich.* 37 *Geo.* 3. which has been alluded to. [" *M.* 37 *Geo.* 3. Mr. *Erfkine* applied to the Court, on behalf of Mr. *Lang*, officer of the liberty of *Pontefract*, to reftrain the officers of this Court from iffuing non omittas latitats, without having a previous writ directed to and returned by him. The Court, on the application to the mafter, finding it had been an univerfal practice to iffue the non omitas writs in the firft inftance, and as no precedent could be produced to fupport the application refufed to interfere."] Now if the Court, after having refufed an application of this fort, fhould fuffer an action like the prefent to be maintained, we ourfelves fhall be the wrong-doers. After an acknowledged practice for above 70 years at the leaft, recognifing the courfe purfued

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pursued by this defendant, and after an application on behalf of the bailiff of the franchise to correct the practice; on which the Court refused to interfere when the question of its legality was brought directly home to their attention; how can a suitor who has sued out the accustomed process of the Court be treated as a wrong doer? How can he be said, in the words of the declaration, to have "wrongfully, injuriously, and deceitfully" caused that to be done, which the Court have authorized in practice for so long a period, and against which they positively refused to interfere when called upon eleven years ago? It would be making the decision of the Court a snare to parties.

Walton and *Littledale*, in support of the rule for a new trial, admitting that the modern practice had prevailed as stated, said that this action was brought in order to try the legality of it: for if it were well founded, the value of the franchise would be entirely lost. And as to the late case referred to, it ought not to conclude the question; for the Court often refused relief on summary application, which might be had in a more regular way; referring the applicant to his legal remedy if he had any: and that is now sought by the present action. But as this was a new point, which they said they had not had so full an opportunity as they wished of considering, the Court adjourned the argument till this term; when it was resumed by the plaintiff's counsel.

As to the first objection, to the generality of the allegation, at any rate it does not apply to the second count, which does not claim for the bailiff the return of *all* writs generally, but only of all writs of *capias* out of *B. R.*: neither does that count require that there should have

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been a previous mandate to the particular bailiff of this franchiſe with a nullum reſponſum from him; but a mandavi ballivo to any bailiff of a franchiſe within the county, and nullum reſponſum returned, would be ſufficient to ſuſtain the ſecond count. The only objection, if any, which can in ſtrictneſs apply to that count is that it does not except writs in which the bailiff is a party; but this, as well as the reſt, is open to the anſwer which has already been ſuggeſted by the Court, that the claim of the return of *all* writs muſt be underſtood of all writs returnable by the bailiffs of franchiſes. For as an allegation of law need not be made, and, if made, need not be proved; ſo where the law allows an exception, it is not neceſſary to notice it in the allegation of a general claim. Even a miſtake in alleging matter of law will not hurt, if ſufficient be ſtated, without that, to maintain the action (*a*). In one ſenſe too the bailiff may be ſaid to have the execution of writs to which he himſelf is a party; for *Dalton's Office of Sheriff* 463., ſays that he may make another bailiff for that purpoſe; which is in effect doing it by deputy. They alſo contended that this general mode of pleading, claiming the return of all writs, &c. was warranted by the precedents. *Vidian's Entr.* 55., The caſe of the hundred of *Glouceſter*. *Thompſ. Entr.* 42. *Brownl. Red.* 49. *Reg. Brev.* 82. *a.* 104. and *Herne's Pleader* 224. and *Cary* v. *Bacchus* 1 *Show.* 17, 18. They alſo referred to Lord *Coke's* comment (*b*) on the ſtatute of *Weſtminſter* 2. *c.* 39.; who ſays that this branch, concerning the non omittas, is in affirmance of the common law; and refers to *Bracton lib.* 5. *fo.* 442. *a.*, where the ſheriff is commanded quod non omitteret propter liber-

(*a*) By *Jones* and *Doderidge Js.* in *Drope* v. *Thaire*, *Latch*, 127. and *Williamſon* v. *Alliſon*. 2 *Eaſt*, 450.

(*b*) 2 *Inſt.* 453.

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tatem *talem*, quin, &c.; and to *Fitz. N. B.* 74. *a.*, where the form is that the sheriff is commanded that he do not omit because of the liberty aforesaid, &c.: though it had been long agreed, and was not now disputed, that a non omittas writ might issue into any *bailiwick* in the county after a mandavi ballivo, &c. to any one, and nullum responsum returned. And they shewed a precedent in 19 *H. 6.* 67. *a.* where the Court amerced the sheriff for returning a mandavi ballivo, qui nullum dedit responsum, to a writ of distringas juratores, on account of the great inconvenience of such a practice.

As to the principal objection, which goes to the right of action, all the precedents of actions against sheriffs and under-sheriffs by the owners of independent liberties for executing non omittas writs there, without a prior writ and mandavi ballivo, &c. returned, proceed upon the ground that it is an injury which the law notices: for the bailiff of the franchise thereby loses the fees which he would otherwise have for executing the process: and power being given to him by the royal grant to return all writs within the liberty, in exclusion of any other officer, it is the same as if the liberty were taken out of the county for that purpose. It is a legal right or privilege paramount to any practice of the court, and cannot be governed by it. The practice therefore which has of late years prevailed, of issuing non omittas writs into these liberties in the first instance, is not analogous to the practice of issuing a latitat, without a prior bill of *Middlesex* to warrant it; for the bill of *Middlesex* is only a *precept* of the court (*a*), and not a *writ*; it has no direction or teste; and therefore it is purely within the discretion of the court to issue or omit it: the practice therefore may

(*a*) 1 *Tidd's Pract.* 35. 41.

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well warrant the omiſſion of it. But in the caſe of *writs*, the iſſuing of them is a matter of right eſſential to the juriſdiction of the court, and cannot therefore be omitted by any practice even if it were of longer ſtanding than it is: but it appears by the *Inſtructor Clericalis* publiſhed in 1727 that it was not then eſtabliſhed, as at preſent; for the uſual practice is there ſtated to be, to ſue out a common latitat and a non omittas writ at the ſame time: though that itſelf was a recent encroachment, as appears by the older authorities. The mere circumſtance of the writ iſſuing by the authority of the court will not protect either the plaintiff or his attorney from anſwering in damages as wrong-doers, if it be iſſued illegally; for thoſe who ſet the power of the court in motion are anſwerable for the conſequences. As in *Barker* v. *Braham* and *Norwood* (*a*), where Mrs. *Braham* having obtained judgment in a former action againſt Mrs. *Barker*, as adminiſtratrix of her deceaſed huſband, upon a bond debt of the inteſtate; after levying part of the ſum recovered out of the aſſets in her hands, ſued out by *Norwood* her attorney a capias ad ſatisfaciendum againſt Mrs. *Barker*, without any ſuggeſtion of a devaſtavit, under which ſhe was taken and impriſoned: and both Mrs. *Braham* and her attorney *Norwood* were holden liable in treſpaſs at the ſuit of *Barker*. [Lord *Ellenborough* C. J. There was no record there which warranted the iſſuing of a writ of capias ad ſatisfaciendum againſt the party; and therefore thoſe who ſued it out could not juſtify under it: but here there was a legal writ under which the party ſuing it out could have juſtified in treſpaſs. That the arreſt itſelf under a non omittas writ is not illegal is ſhewn by the caſe of *Fitzpatrick* v. *Kelly* (*b*). *Le Blanc* J. The queſtion in

(*a*) 3 *Wilſ.* 368. (*b*) Cited in 3 *Term Rep.* 740.

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the case in *Wilson* was whether the defendants who had caused the plaintiff to be arrested, and were therefore primâ facie trespassers, could justify the caption under the writ of execution which they had sued out: and the writ itself being unwarranted by any judgment, their justification necessarily failed.] The case of *Fitzpatrick* v. *Kelly* admits that the party making the arrest is liable to answer to the owner of the franchise thereby violated: and this also appears from 20 *H.* 7. *fo.* 7. *a.* All the authorities too agree that an action lies by the owner of the franchise against the sheriff or officer who invades his liberty, and makes the arrest there without legal authority. And in *Grant* v. *Bagge* (*a*) it was held that a writ of fieri facias directed in the first instance to the bailiff of the royal franchise of *Ely*, out of this court, (instead of to the sheriff of *Cambridgeshire*, who should have issued his mandate to the bailiff,) was erroneous and void, and that the bailiff executing it was guilty of a trespass against the party whose goods were taken under it: and upon the same principle, it must lie against the party who illegally sues out a non omittas process in the first instance. [Lord *Ellenborough*. That does not follow: every sheriff or other officer is bound to know the limits of his jurisdiction: or if the case be doubtful, he may apply to the court and state the special circumstances. In the case of *Grant* v. *Bagge* one who was no officer of the court took upon him to execute process illegally directed to him, there being no practice to warrant it; but here the defendant has done no more than follow the usual practice of the court long established: and can we suffer him to be treated as a wrong-doer for that? It might have been a different question if he had made any false suggestion

(*a*) 3 *East*, 128.

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or reprefentation to our officer to induce him to iffue a non omittas writ, without which another fort of procefs would have iffued in courfe.] It is no objection that this is the firft inftance of an action of the kind brought fince the practice has prevailed, (if the fact be fo); for during all this period the bailiffs of franchifes appear to have exercifed their rights, and taken their accuftomed fees; and while they were ftill deriving profit from their offices, it was not worth while to incur the rifk and expence of an action in a particular inftance. But now that the queftion is at length raifed, if the court hold that no action will lie for the violation of the franchife, it will in effect abolifh the franchife itfelf.

Lord ELLENBOROUGH C. J. There might be fome queftion whether the prefent ground of nonfuit can be fuftained; whether the plaintiff could claim the execution and return of *all* writs, &c. when there are various exceptions, fuch as writs of wafte, re-diffeifin, cafes in which the king is party, or in which an informer fues as well for the king as for himfelf, and others which have been mentioned, in which the procefs is to be executed by the fheriff. And though feveral precedents have been fhewn in favour of this general mode of declaring, particularly that in *Vidian*, touching the liberty in queftion; yet the authority of Lord *Hale* in the latter cafe cannot well be urged in confirmation of it, becaufe the frame of the declaration was not confidered by him at all, though he went very fully into the other parts of the cafe. But independent of the particular ground of the nonfuit, it would be frivolous to fend down the cafe to a fecond trial, if it appear to us, as it does, that the plaintiff would not be able to fuftain a material allegation in his declaration,

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tion, namely, that the defendant "*wrongfully, injuriously, and deceitfully*" caused and procured the writ in question to be issued. How can we say, in a case where the court, at least as far back as 1727, has been in the practice of issuing the non omittas writ, without first issuing a common latitat, and waiting for the return from the sheriff of a mandavi ballivo with qui nullum dedit responsum; and after Lord C. B. *Gilbert* has recognized that practice as existing in his time; and when we know that objections were made to the practice of taking out non omittas writs in the first instance so far back as 1739, and actions threatened, but still it continued, and is recognized as the usual practice in all the books on the subject since that time; and no instance can be produced during all this time of any action brought against a party suing out such a writ: how can we say that the plaintiff can be considered as a wrong-doer for issuing such a writ, according to this long established practice of the Court. If this may be done, I know not what process may not be shaken: for, as I before observed, the issuing of a latitat without a previous bill of *Middlesex* stands only on the practice of the Court; and that instance is the stronger, because the latitat contains a false recital of facts on which it professes to be grounded. [His Lordship referred to *Style's Prac. Reg.*] The subject however has not passed wholly sub silentio; for in 1796 an application was made to set aside a non omittas writ issued in the first instance into this very liberty; which the Court refused. Is it then to be expected that after the question has been brought directly to the notice of the Court, and they have refused to restrain the issuing of such a writ on the ground of its illegality, a party suing is to be wiser than the Court in discovering the illegality of its process; and if he be not, that he is

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to be treated as a wrong-doer for having issued a process, the issuing of which the Court when called upon refused to recal or condemn. It is clear therefore that the plaintiff must fail in proving a substantive and material allegation in his declaration; and therefore it is needless to set aside the nonsuit.

GROSE J. It is not necessary to inquire into the precise ground of the nonsuit, because, upon the general objection taken by my Lord, it would be useless to grant a new trial. For the practice has long prevailed and is now clearly established, that a capias with a non omittas clause may be taken out in the first instance: and the case which occurred in 1796 fortifies the old practice, and was a recognition of it by the Court. It would therefore be in vain to send the record down to a second trial, when the plaintiff must again be nonsuited on this objection.

LE BLANC J. In shewing cause against this rule an objection has been taken to the action itself: and if the action be not maintainable, it is unnecessary to enter into the other objection, which is only to the form of the declaration. And it appears to me that the action does not lie; for the defendant is charged with having *wrongfully*, &c. sued out the non omittas writ. But it does not appear to have been issued by the officer upon any false suggestion of the party suing: on the contrary it was issued according to the regular practice of the Court, which has subsisted for a long period; and in the only instance which has been shewn of any attempt made to set aside such a writ as irregular, the Court refused the application. Therefore when it appears that there

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was no false suggestion of the party to obtain the writ, and that the issuing of it was not irregular, how can we say that the party is a wrong-doer in suing out such process. This differs the present case from those which have been cited, where a party suing out a writ may yet be a trespasser; for he, as well as the officer who executes the writ, may be a trespasser, unless he can justify under it; which could not be done in the case of *Barker* v. *Barham* and *Norwood*, because there was no judgment to warrant the taking the person of the administratrix in execution. But there was a very good reason for not bringing an action of trespass in this case, because the writ would have justified both the party who sued it out, and the officer who executed it. The plaintiff was therefore driven to the experiment of bringing an action on the case, in which however it is stated that the party *wrongfully* sued out this process: and it now appearing that the writ was sued out according to the long established practice of the Court, confirmed in the only instance in which it was attempted to be impeached for irregularity, we cannot say that the party suing it out is a wrong-doer.

Rule discharged.

SCOTT *against* LIFFORD (a).

Friday, May 6th.

Where the indorsee of a bill of Exchange lodged it with his bankers who presented it for payment on the 4th, when it was dishonored, and on the 5th they returned it to the indorsee, who gave notice to the drawer of the dishonor on the 6th by the two-penny post: held such notice to be reasonable.

THIS was an action by the indorsee of a bill of Exchange against the drawer. It appeared that the bill had been drawn on the 1st of *March* 1806 by the defendant on one *Moses Agar*, payable three months after date: and the plaintiff, having become the holder of it, had placed it in the hands of his bankers, *Down* and Co. On the 4th of *June*, when the bill became due, a clerk of *Down* and Co. presented it for payment; and it was dishonored. On the 5th they returned it to the plaintiff, who by letter, put into the two-penny post on the 6th, gave notice to the defendant of the dishonor; the plaintiff living in *London*, and the defendant at *Shadwell*. The case was left to the jury on the question, whether the notice of the dishonor had been given in reasonable time; and the jury, being of opinion that it had, found a verdict for the plaintiff. And on motion by *Wigley* for a new trial on the ground that due diligence had not been used;

Lord ELLENBOROUGH C. J. said, I cannot say that the holder on the return of the bill dishonored to him is bound, omissis omnibus aliis negotiis, to post off immediately with notice: if reasonable diligence has been used, it is sufficient.

GROSE J. Whether due diligence has been used is a question of law; but judges may take the opinion of a

(a) Ex relatione Mag[i] Selwyn.

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jury as to what is convenient in the manner of giving notice.

LE BLANC J. It cannot be contended that a banker ought to give notice of the dishonor to any but his customer for whom he held the bill: and I cannot rule that the holder of a bill may not avail himself of the conveyance by the two-penny post.

Rule refused.

Friday, May 6th.

STADT *against* LILL.

A guarantie in writing to pay for any goods which the vendor delivers to a third person is good within the 4th sect. of the stat. of frauds, as containing a sufficient description of the *consideration* of the promise, (namely, the delivery of the goods when made) as of the *promise* itself; both of which are included in the word *agreement* required by that section to be reduced into writing, &c.

THIS was an action on the case for the breach of a guarantie in not paying the value of goods delivered by the plaintiff to one *Nichols*. The defendant gave a written guarantie signed by him in this form: "I guarantee the payment of any goods which *J. Stadt* delivers to *J. Nichols*." It was objected at the trial before Lord *Ellenborough* C. J. at *Guildhall*, that this guarantie was void by the 4th sect. of the statute of frauds 29 *Car.* 2. *c.* 3. which avoids any promise to answer for the debt of another unless the *agreement* be in writing, &c.: and in *Wain* v. *Warlters* (*a*), recognized in *Egerton* v. *Matthews* (*b*) it was held that the word *agreement* included the consideration for the promise as well as the promise itself: and here there was no consideration stated for the promise. But Lord *Ellenborough* was of opinion that the stipulated delivery of the goods to *Nichols* was a consideration appearing on the face of the writing, and when the delivery took place the consideration attached: and he directed the jury accordingly; who found for the plaintiff: but he

(*a*) 5 *East* 10. (*b*) 6 *East* 307

gave

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gave leave to the defendant to move to enter a nonfuit if this direction were wrong.

The Attorney-General now moved accordingly, and ftated the objection, and the cafes on which it was founded.

But *the Court* were fatisfied that the direction was right, for the reafon before given by Lord *Ellenborough*, which his Lordfhip now repeated as above ftated.

Rule refufed.

HANDS *againft* BURTON.

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Proof that the defendant agreed to fell his horfe warranted found to the plaintiff for 31*l.* 10*s.* and at the fame time agreed that if the plaintiff would take the horfe at that value, he, the defendant, would buy another horfe of the plaintiff's brother for 14*l.* 14*s.* and that the difference only fhould be paid to the defendant, will fupport a count charging only that in confideration that the plaintiff would buy of the defendant a horfe for 31*l.* 10*s.* the defendant promifed that it was found, and that in fact the plaintiff did buy the horfe *for that price, and did pay to the defendant the faid* 31*l.* 10*s.*

THE declaration ftated that in confideration that the plaintiff would buy of the defendant a horfe for 31*l.* 10*s.* to be paid by the plaintiff to the defendant, the defendant promifed that the horfe was found: and that the plaintiff did buy of the defendant the horfe *for that price, and did pay to the defendant the faid* 31*l.* 10*s.*; and then alleged as a breach that the horfe was unfound. The proof, at the trial before *Graham* B. at *Oxford*, was that the defendant agreed to difpofe of his horfe, which he warranted found, to the plaintiff for 30 guineas; but agreed at the fame time that if the plaintiff would take the horfe at that value, he, the defendant, would purchafe of the plaintiff's brother another horfe for 14 guineas, and that the difference only fhould be paid to the defendant. The witnefs defcribed it as *one deal* between the parties, and that but for the latter confideration he did not believe that the bargain would have been made.

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It was therefore objected that the proof varied from the contract as laid, and shewed rather a contract for the exchange of horses, paying the difference only in money, than an entire money payment for the horse in question. The learned judge however refused to nonsuit the plaintiff, but reserved the point; and the plaintiff recovered on proof of the unsoundness of the horse.

W. E. Taunton now moved to set aside the verdict, and enter a nonsuit, on the variance stated. But by

Lord ELLENBOROUGH C. J. The parties agreed to consider the brother's horse as 14 guineas in their mode of reckoning the payment for the defendant's horse; but still the consideration for the latter was 30 guineas, and the defendant received 30 guineas in money and value.

GROSE and LE BLANC Justices, concurred. The latter observed that the agreement was in effect this: the plaintiff says, I will buy your (the defendant's) horse for 30 guineas, and you shall buy my brother's horse for 14 guineas, and the 14 guineas which you are to pay shall be reckoned as part of the 30 which you are to receive.

Rule refused.

FRENCH *against* PATTON.

Friday, May 6th.

A policy of insurance originally underwritten on "ship *and outfit*" was after the ship sailed declared by consent of all parties, to on "ship *and goods*," by a memorandum written on a blank space in the body of the policy; but without any new stamp; it having been before decided that for want of the stamp the plaintiff could not recover as upon a policy on ship *and goods*, as declared by the memorandum; it was now held that he could not recover on the policy as originally an insurance on "ship *and outfit*," by reason of the alteration apparent upon the face of the instrument itself, and which was made by the parties interested.

THIS was another action on the same policy of insurance, on which *Hill*, as agent, before sued this defendant, and which is reported under the name of *Hill* v. *Patton* (*a*). The plaintiff there declared as on a policy on *ship and goods* (*b*); and it then appeared that the policy, which, as it stood in the printed part of it was on *ship and goods*, had been restrained by a written note in the margin to *ship and outfit*, in consequence of a misunderstanding by the broker of the instructions of his principal, in which state it was subscribed by the underwriters in *September* 1804; and that on a subsequent application to them by the broker made long after the sailing of the ship, they had agreed to alter it, by the following memorandum, inserted in the body (*c*) of the policy, upon a blank space between the printed parts; against which the underwriters wrote their initials. "It is hereby agreed "that the interest in this policy of insurance shall be on "*ship and goods*, instead of *ship and outfit*, as originally "declared. *London*, 13th *March* 1805."

The Court were of opinion in the former case that though the alteration were agreed to by the underwriters, yet as it

(*a*) 8 *East*, 373.

(*b*) The beginning of the former report inadvertently states that action to have been brought on a policy of insurance on "ship *and outfit*," instead of "ship *and goods*:" but the error is manifest both from the marginal notes, and the whole context of the report.

(*c*) Upon the former occasion the memorandum was said to be indorsed on the policy; but by a fac simile of the policy now shewn in Court it appeared to have been made in the manner above stated.

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effentially varied the rifk infured, it could not be made effectual without a new ftamp; and therefore they fet afide the verdict which had been obtained by the plaintiff upon proof of a total lofs. And now the affured brought a new action in his own name, and declared as upon a policy on *fhip and outfit*, being the form in which it was originally fubfcribed by the underwriters, and which remained legible in the fame ftate as before. But Lord *Ellenborough* C. J. was of opinion that the alteration having been made by one who had competent authority to bind his principal, though made by confent of the underwriters, avoided the policy as it was before, and therefore it could not be declared upon in its original ftate without a new ftamp. The cafe now came on in the peremptory paper upon a rule obtained in a former term for fetting afide the nonfuit, and having a new trial: againft which

The Attorney General and *Garrow* were now to fhew caufe; but they thought the ground of the nonfuit fo clear, as ftated by his Lordfhip, that they waved adding any thing by way of argument in fupport of it.

Park and *Marryat*, in fupport of the rule, argued to this effect: There is no alteration or erazure of the original inftrument, which remains, as it was at firft fubfcribed, a policy of infurance on "fhip *and outfit*;" and this was at one time binding on the parties. But they afterwards contemplated to vary the agreement, and to make it a policy on fhip *and goods*; and this was attempted to be done, not by any fpoliation of the original inftrument, which would have raifed the queftion whether it were thereby avoided, though done without fraud, and for a purpofe which had failed; but by a diftinct memorandum, bearing a different date from the original policy,

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and therefore the ſame for this purpoſe as if made on a different piece of paper, agreeing that the policy ſhould ſtand, as it originally did, (meaning in the printed part) on ſhip *and goods*. Now, either that memorandum was or was not effectual to do away the original contract between the parties and ſubſtitute a new one. This Court in the former caſe of *Hill* v. *Patton* held that it was not effectual, and could not be received in evidence without a new ſtamp, and therefore that the plaintiff, who had declared as upon a policy on ſhip *and goods* according to the memorandum, could not recover. It follows then that the original contract, unaffected by any legal evidence of a different contract ſubſequently entered into, muſt remain in force. The facts only ſhew that there was an ineffectual attempt to alter it. If the Court cannot look at the memorandum for the purpoſe of ſuſtaining the original frame of the policy in its printed form, neither can they look at it in order to overturn it as it ſtood when ſubſcribed. A perfect contract muſt be ſubſtituted before a former perfect contract can be ſuperſeded. To ſhew that, independent of any objection ariſing on the ſtamp laws, an alteration made, bonâ fide, by conſent, and in order to correct a miſtake, would not vitiate a policy, they cited *Bates* v. *Grubham* (*a*) as in point: which was ſupported in principle by *Motteux* v. *The London Aſſurance Company* (*b*). So in *Zouch* v. *Claye* (*c*), the adding by conſent the name of a ſecond obligor to a bond after the execution of it by the firſt obligor was held not to avoid it. Lord *Hale* there referred to a caſe in *Moor* (*d*) as confirmatory

(*a*) *Salk.*, 444. (*b*) 1 *Atk.* 545. (*c*) 2 *Lev.* 35. and 1 *Ventr.* 185.

(*d*) In the report in *Levinz* the reference is to *Moor*, pl. 738. which is a miſprint for pl. 1730. See alſo *Moor* 835. pl. 1125. where the plaintiff ſued on

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confirmatory of this doctrine; which he says had been before adjudged to the contrary in *Cro. Eliz.* 626 (*a*). The avoiding of the instrument was part of the penalty annexed by the common law to the fraudulent alteration of it. Then in the late case of *Henfree* v. *Bromley*,

on an obligation, which the jury found specially to have been interlined, after the execution of it by the defendant, with the words *Vicecomiti comitatus Oxon*, without the privity of the plaintiff; but they did not find by whom it was done: and because the interlining was not in a material place, nor with the privity of the plaintiff, the Court gave judgment for him: but they said that if it had been in a material place, or with his privity, *without the assent of the obligor himself*, it would have avoided the deed.

(*a*) This refers to the case of *Markham* v. *Gonaston* in *Tr.* 40 *Eliz. Rot* 212. It appears by *Croke*'s Report (*Cro. Eliz.* 626.) that *Markham* had brought debt in *C. B.* upon an obligation against *Fox*, who pleaded the filling up of the blank spaces in the bond after the sealing and delivery, and therefore that it was not his deed; which was held to be a good cause of avoiding the bond: wherefore issue was taken that they were not filled up *after* the sealing and delivery; and it being proved at Nisi Prius that they were so filled up, the plaintiff was nonsuited. The plaintiff then brought an action on the case, (which is the one reported in *Cro. El.* and *Moor* 547.) against the defendant *Gonaston* for having afterwards fraudulently filled up certain blanks, &c. in the bond, without the assent or notice of the plaintiff, and in order to avoid the bond: on which the plaintiff recovered judgment; the opinion of the Court as there stated being, that the bond was avoided by the material alterations made in it, though for the benefit of the obligor, and by his assent. But the report in *Moor* notes, that afterwards the plaintiff brought a new action upon the bond against *Fox*, who pleaded the special matter, and concluded that it was not his deed; to which *Markham* replied that the blanks were filled up *with his assent*: and on demurrer it was adjudged for the plaintiff in *B. R.* And this explains what was said by *Hale* in *Zouch* v. *Claye*, 2 *Lev.* 35. Lord *Ellenborough* C. J., in this part of the argument, asked whether these cases were not all considered in *Master* v. *Miller*, 4 *Term Rep.* 320.: to which no answer was given from the bar: but 13 *Vin. Abr.* tit. *Faits*, T. & U. were referred to as collecting all the cases. It appears however upon reference to that case, that though many other authorities were mentioned, these were not; though much in aid of Mr. Justice *Buller*'s argument, who differed from the rest of the Court.

ley (*a*), this Court held, that an award, which was altered by the umpire after his authority had expired, though void for the increafed fum directed to be paid, was yet good for the original fum awarded, which ftill continued legible.

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Lord ELLENBOROUGH C. J. In that cafe the act of the umpire in altering the award, after his authority had expired, was taken to be the fame as the act of a mere ftranger. But here the broker had a continuing authority to bind his principal by the alteration of the policy; and the alteration was effectual to bind all the parties if a new ftamp had been affixed on the inftrument. The new agreement was complete as far as the will of the parties could make it fo; and it only wanted a circumftance which the law requires to give it its full legal effect. But though ineffectual as an inftrument to fue on, it feems effectual to do away the former agreement which was thereby abandoned. If this were otherwife, would it not operate as a fraud on the revenue. I am glad however that this cafe comes before us on a nonfuit, becaufe the plaintiff will not be concluded by our prefent opinion. I have turned the queftion in my mind again and again with great anxiety. In the firft action the plaintiff infifted on the alteration as made agreeably to the real intentions of the parties, and that the policy as it was firft fubfcribed was contrary to the inftructions of the broker and by miftake. But now he defires us to confider that it was not altered, becaufe it was not effectually altered for want of a new ftamp to the memorandum. But is it not

(*a*) 6 *East*, 309. and vide *Irvine* v. *Elnon*, 8 *East*, 54.; which was alfo referred to as confirmatory of the other cafe.

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made a different policy by the memorandum, by which a different contract is substituted by the act of the parties in lieu of the former one, which they abandon? Is it less effectual to shew the intention of the parties because it is a fraud in law against the revenue. The plaintiff's own act has made, as far as he can make, the policy speak a different language from what he now insists that it does, and he must take the consequences. I cannot therefore say that the policy is not so altered as to have lost its original identity, though the circumstance of a stamp be wanting to give full effect to the instrument so altered: and I do not think that the plaintiff can recur to it again in its original state. If however he shall be advised to question our opinion, I am glad that the opportunity will still be open to him.

GROSE J. This is an action brought upon a contract which was once perfect, till it was superseded by another contract which was also perfect, as far as the will of the parties was declared; but it could not be put in suit for want of the stamp which the law requires. Still it appears upon the face of the former contract that it has been altered and vacated, and this has been done by the act of the parties who were competent to do so. Whatever reluctance I may feel, I must declare the law as it appears to me.

LE BLANC J. We must give the rule of law in this case, as far as we are compelled to do it, with reluctance, because it is against a party who perhaps meant to do no wrong at the time: but can the Court enforce an agreement after the parties themselves have upon the very face of

of the ſame inſtrument declared that it is not their agreement, and have actually written another and a different agreement in the place of it. And I cannot ſay that it is the ſame thing as if the memorandum had been written on a different inſtrument; for it is inſerted in the body of the original agreement, and makes it ſpeak a different language. It ſhews an entire alteration in the minds of the contracting parties. Then finding that the ſubſtituted agreement cannot be enforced becauſe of an objection ariſing upon the ſtamp laws, the plaintiff now wiſhes to reſort back to that which he has declared was not his agreement. There is another reaſon why this ſhould not be permitted to him, becauſe it is againſt the policy of the revenue laws: for it would hold out encouragement to break theſe laws, and to try alterations of this ſort, if after an attempt made to alter a contract without a new ſtamp, it ſhould be held that though the attempt were ineffectual as to the new contract of the parties, they could recur back again to the original agreement and ſet that up again.

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FRENCH *againſt* PATTON.

Rule diſcharged.

Saturday, May 7th.

Though it be proper for a magistrate in drawing up a conviction on the stat. 5 *Ann.* c. 14. to state the particular evidence of the fact on which his judgment is founded, and not merely the legal effect of it in the words of the statute, yet a conviction in the latter form is valid in law: but the magistrate subjects himself to an information if he endeavour to shelter himself from detection by mis-stating such legal result when the evidence would not warrant it.

The KING *against* PEARSE.

ABBOTT moved for a certiorari to bring before the Court a conviction on the stat. 5 *Ann. c.* 14. *s.* 4. drawn up according to the precedent in *Burn's Justice*, followed in the case of the *King* v. *Thompson* (*a*), though disapproved by all the Court, wherein the deposition of the witness to the fact was stated in the words of the statute; namely, that the defendant on the day and place mentioned "*did keep and use a certain engine called a gun, to kill and destroy the game;*" without setting forth the particular evidence of the fact. The same form had been adopted before in *Rex* v. *Hartley* (*b*), and was afterwards pursued in *Rex* v. *Lovet* (*c*); but in the latter case the Court greatly disapproved of it; and granted a rule calling on the convicting magistrate to shew cause why a criminal information should not go against him for not stating all the evidence given; and after hearing the affidavits on both sides the rule was finally discharged only on the ground that the magistrate had not acted corruptly, and might have been misled by the precedent in *Rex* v. *Thompson:* but they expressed their opinion in strong terms, that it was the duty of magistrates in all cases to state the whole of the evidence and not merely the result of it. And in the *King* v. *Clarke* (*d*), where the particular evidence of the fact of killing the game was set forth, the Court expressed their approbation of it; and recommended it as a precedent to be followed in future; and expressed

(*a*) 2 *Term Rep.* 18. (*b*) *Cald.* 175.
(*c*) 7 *Term Rep.* 152. (*d*) 8 *Term Rep.* 220.

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themselves much dissatisfied with the general mode of stating the evidence, in the terms of the act of parliament, which had been practised in these cases. He therefore moved for the certiorari in this case, with a view to settle the question in future. But by

Lord ELLENBOROUGH C. J. all the arguments against this form of conviction were discussed and considered in the *King* v. *Thompson*; and though the Court disapproved of it, still they held themselves bound by former precedents to support it. The point therefore having been decided again and again, we cannot have it discussed any more.

LE BLANC J. If a magistrate endeavour to shelter himself from detection by merely stating the fact of the offence in the terms of the act of parliament, as if it were the legal effect of the evidence, when the evidence itself would not warrant the conclusion, he subjects himself to a criminal information, upon a proper case laid before the Court.

Per Curiam, The writ denied.

Saturday, May 7th.

Derby Canal Company *against* Wilmot, Bart.

Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with that intent; yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser.

IN ejectment for lands in the county of *Derby* Sir *Robert Wilmot*, the defendant, claimed by conveyance from the company, which is incorporated by act of parliament, under their seal. It appeared at the trial at *Derby*, that the defendant had purchased the land in question from the company, to whom he had sold other land, and there were accounts subsisting between them which were not settled. That upon the occasion when the company's seal was affixed to the conveyance in question, their managing committee (which had authority for this purpose) was sitting at an inn in the town, and the conveyance having been brought to them, they directed their clerk to affix the seal to it, but not to part with it till the accounts were adjusted: the company's clerk accordingly sent his clerk with the conveyance to the house where the seal was usually kept in the town, in order to affix the seal to the instrument, but with a direction not to part with it, but bring it back to him; which was done accordingly. *Wood*, B. thought that the conveyance under these circumstances was not complete to pass the legal estate, and therefore the plaintiffs recovered a verdict; which

Vaughan, Serjeant now moved to set aside, upon the authority of 2 *Rol. Abr.* 23. *l.* 50., which cites the case of the Dean and Chapter of *Fernes*, *Dav. Rep.* 44. *b.* that the deed of a corporation needs no delivery, but the affixing of the common seal gives it perfection without delivery. But

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DERBY CANAL COMPANY *against* WILMOT.

Lord ELLENBOROUGH C. J. anfwered, and the reft of the *Court* agreed, that in order to give it effect, the affixing of the feal muft be done with intent to pafs the eftate; otherwife it operates no more than a feoffment would do without livery of feifin: whereas here, though the feal was directed to be and was affixed to the inftrument for form, yet it was with a refervation of any prefent effect to pafs the title out of the company, as they did not chufe to deliver over the poffeffion of the conveyance till the accounts were fettled between them and the purchafer.

Rule refufed.

PURCELL *againft* MACNAMARA.

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It lies on the plaintiff in an action for a malicious profecution to give evidence of malice in the defendant, either exprefs, or to be collected from circumftances fhewing plainly the want of probable caufe; and the malice is not to be implied from the mere proof of the plaintiff's acquittal for want of the profecutor's appearing when called.

AT the fecond (*a*) trial of this caufe, which was an action for a malicious profecution againft the defendant for having indicted the plaintiff of perjury; affigning the perjury on an affidavit made by the plaintiff fwearing to words uttered by the defendant; the proof on the part of the plaintiff in addition to the formal proof of the record of acquittal was, that after the indictment found was ready for trial, the profecutor (the prefent defendant) was called and did not appear; on which the verdict of acquittal paffed: without proceeding to give any further evidence of malice than what, it was contended, arofe from the abfence of any proof of probable caufe. But Lord *Ellenborough*, C. J. who tried the caufe, thought that this was not fufficient to fupport the

(*a*) See the Report, ante 157, on the firft trial.

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the action, without evidence of express malice, or at least of circumstances evincing such entire want of probable cause from whence malice was to be presumed: and therefore he nonsuited the plaintiff.

Gurney now moved to set aside the nonsuit; and admitted that the doctrine laid down by his Lordship was supported by the authority of *Savil* v. *Roberts* (*a*): but this, he said, had been overruled in the case *Parrot* v. *Fishwick* (*b*), *London* sittings after *Trinity* Term 1772, mentioned in *Bull.* N. P. 14, in which it is stated to have been ruled, that "where the facts lie in the "knowledge of the defendant himself, he must shew a "probable cause, though the indictment be found by "the Grand Jury; or the plaintiff shall recover without "proving express malice." And here he contended,

(*a*) *Salk.* 13. 1 Lord *Ray.* 374. 5 *Mod.* 410. 12 *Mod.* 211.

(*b*) The generality of the position laid down in the printed note of the case is scarcely warranted by the MS. note of the case, from whence it was probably taken; which was this. *Parrott* v. *Fishwick*, *London* sittings after *Trin.* 1772. "In an action for a malicious prosecution in preferring and prosecuting an indictment for perjury, where the bill of indictment was found, and the plaintiff acquitted by verdict; Lord *Mansfield*, in summing up, said, it was not necessary to prove *express* malice; for *if it appeared* that there was *no probable cause*, that was sufficient to prove an *implied* malice, *which was all that was necessary to be proved to support this action.* For in this case all the facts lay in the defendant's own knowledge; and if there were the least foundation for the prosecution, it was in his power and incumbent on him to prove it. Verdict for the plaintiff 50l." A marginal note adds, that "the indictment was for perjury committed on the trial of an action for use and occupation brought by the defendant against the plaintiff's master."

It is quite consistent with this summing up, that the plaintiff should have given primâ facie evidence at least of the want of probable cause, from whence, if unexplained, malice might be collected.

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that the fact on which the perjury was assigned, namely, the words sworn to have been uttered by the defendant, being necessarily a fact within his own knowledge, might, if not true, have been disproved by him on the prosecution of the indictment. [Lord *Ellenborough*, C. J. the rule by which I was governed does not stand upon the authority of *Savil* v. *Roberts* alone: the same point was ruled by Lord *Kenyon*, in *Sykes* v. *Dunbar* (a), that it was not sufficient for the plaintiff to shew his acquittal in order to sustain the action, without going further and giving evidence of malice in the defendant.] In that case, *Dunbar* was the only witness upon the indictment; but here there were other witnesses besides the prosecutor on the indictment.

Lord ELLENBOROUGH, C. J. The question comes in fact to this, whether proving an acquittal for want of prosecution be primâ facie evidence of malice to support an action for a malicious prosecution: the contrary of which has been always held. The want of probable cause may indeed be so strong and plain as to amount to evidence of malice; but that must be shewn by the plaintiff.

GROSE J. It is necessary for the plaintiff to give evidence of malice in the defendant, in order to support the action.

LE BLANC J. An action for a malicious prosecution cannot from the very nature of it be maintained without proof of malice, either express or implied:

(a) Sittings after *Michaelmas* Term, 40 *Geo.* 3.

 and

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and malice may be implied from the want of probable caufe; but that muft be fhewn by the plaintiff.

Rule refufed. (*a*)

(*a*) Vide *Johnftone* v. *Sutton*, in error, 1 *Term Rep.* 545.

Saturday, May 7th.

WELLER *againft* TOKE.

One magiftrate committing the mother of a baftard to cuftody for not filiating the child is yet entitled to the previous notice of action required by the ft. 24 *G.* 2. *c.* 44. though by the ftat. 18 *Eliz.* *c.* 3. §. 2. jurifdiction over the fubject matter is committed to *two* magiftrates.

THE defendant, a juftice of peace for the county of *Kent*, being fued in an action of trefpafs and falfe imprifonment, for having, without the concurrence of any other magiftrate, committed the plaintiff to cuftody for not filiating her baftard child, upon a fummons to appear before himfelf; from which imprifonment fhe was afterwards difcharged by his order; it was objected at the trial at *Maidftone*, before the Chief Baron, that the tranfaction had taken place twelve months before the action brought, and that no previous notice of the action had been given, as required by the ftat. 24 *Geo.* 2. *c.* 44.; on which the plaintiff was nonfuited.

Garrow now moved to fet afide the nonfuit, on the ground that the defendant, having acted wholly without jurifdiction in affuming to himfelf authority to commit the mother for not filiating a baftard child, when the ftatute 18 *Eliz.* *c.* 3. §. 2. only gives jurifdiction in fuch matters to *two* juftices of peace, which muft be exercifed by them together (*a*), was not entitled to the notice required by the ftatute; inafmuch as the act could not be

(*a*) *Billings* v. *Prinn* and another. 2 *Blac. Rep.* 1017.

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ſaid to have been done in the execution of his office; and the ſtatute only intended to protect magiſtrates acting irregularly or erroneouſly in caſes where they had juriſdiction in themſelves of the ſubject matter. And he cited *Alcock* v. *Andrews* (*a*), where Lord *Kenyon* is ſaid to have taken the diſtinction between a conſtable acting *colore officii*, and *virtute officii*: that he was not protected by the ſtatute in acting *colore officii*, where his office gave him no authority to do the act; but only when acting within the limits of his official authority, he exerciſed that authority improperly, or abuſed the diſcretion placed in him.

Lord ELLENBOROUGH C. J. It is not denied that the defendant had authority to act as a magiſtrate upon the ſubject matter of the complaint brought before him, though he could not act alone. Though the act of commitment, therefore, cannot be ſaid to have been done by virtue of his office, yet the ſubject matter was within his juriſdiction, and he intended to act as a magiſtrate at the time, however miſtakenly. The very object of the legiſlature in requiring the notice to be given was to enable the magiſtrate to tender amends as for the wrong done, contemplating him as a wrong-doer. If this had been an act wholly aliene to his juriſdiction, I ſhould have ſaid that he acted without the protection of the law.

Per Curiam, Rule refuſed (*b*)

(*a*) Sittings after *Michaelmas* Term, 1788. 2 *Eſp. Ni. Pri. Caſ.* 542.
(*b*) Vi. *Milton* v. *Green*. 5 *Eaſt*, 233.

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Tuesday, May 10th.

DENN, on the Demise of JAMES WILKINS, *against* KEMEYS and Another.

Under a devise to *A.* for life, remainder to *B.* and her heirs; but if *B.* die before *A.*, *or* if she die without heirs of her body, then to *C* and his heirs, &c: held that the devise over to *C.* after *B.* could only take effect if *B* died before *A* *and* without issue; for that unless *or* were read as *and*, the devisee over would take if *B.* died before *A.*, although *B.* left issue; which would clearly be against the apparent intent of the devisor, which was to prefer the issue of *B.* to *C.*
It seems that *freehold* may pass by a will giving the estate a local description and name, though it be mistakenly called *leasehold*; there being no other property answering to the name and description.

AT the trial of this ejectment for a messuage, stable, coach-house, garden, orchard, and two acres of land in *Tiddenham*, in the county of *Gloucester*, a verdict was taken for the plaintiff, subject to the opinion of this Court on the following case.

William Philpot being seised in fee of the premises in question by indenture of feoffment of 29th *April* 1641, conveyed the same to *William Jones* in fee. *William Jones*, by indenture of the 25th *September* 1678, between him and *Ann* his wife, of the one part, and *William Wilkins* (the great grandfather of the lessor of the plaintiff) of the other part, in consideration of 16*l.* demised the premises to *W. Wilkins* his executors, &c. for 999 years: and by indenture of release of the 26th *September* 1678, gave, granted, remised, and released, and for ever quitted claim to *W. Wilkins*, in his possession being, and to his heirs and assigns for ever, "all the estate, right, title, interest, "claim, and demand whatsoever which he the said "*William Jones* then had, or ever had, or which his "heirs, executors, administrators, or assigns, at any time "or times hereafter should or might or could have or "claim of in or to the said premises; to hold unto the "said *W. Wilkins* his heirs and assigns, to the only pro-"per use and behoof of him the said *W. Wilkins* his "heirs and assigns for ever," with general releases, and warranty. The last deed was duly executed and attested by the same subscribing witnesses as attested the execution of the next preceding deed. *W. Wilkins* occupied the

the premises, and died possessed thereof in 1736, leaving his widow *Catherine* in possession, and leaving a son *Joseph*, and three daughters, *Ann*, *Sarah*, and *Eleanor*. By indenture of *March* 18th, 1728, between *W. Wilkins* and *Catherine* his wife, of the first part, and *Ann Anderson* of the second part; reciting the deed of the 25th of *September* 1678; *W. Wilkins* and *Catherine* his wife did *grant, bargain, sell, assign, and set over*, the premises to *Ann Anderson* for the residue of the term of 999 years created by the deed of the 25th of *September* 1678, as a security for the repayment of 25*l.* and interest: with a proviso that if *Wilkins* and his wife, or their or either of their *heirs*, executors, &c. should pay to *Anderson*, her executors, &c. the principal and interest on the 17th of *September* then next, the indenture should be void. By indenture of the 19th of *September* 1732 between the same parties, the premises were further conveyed to *Anderson* for securing a further sum of 5*l.*, with a like proviso on payment of 30*l.* on the 18th of *March* then next. By indenture of the 30th of *September* 1736, between *Catherine Wilkins* of the one part, and the said *Joseph Wilkins* of the other part, *Catherine*, in consideration of 5*s.* bargained and sold the messuages with one piece of ground, then in her possession, containing by estimation about one acre, in *Teddenham*, &c. to *Joseph Wilkins* in fee (*a*). *Catherine* died in 1740 in possession of the premises, leaving *Joseph Wilkins*, the eldest son and heir at law of the said *William* and *Catherine*, and their three daughters, *Ann*, *Sarah*, and *Eleanor*, her surviving. *Joseph Wilkins* after-

(*a*) It was admitted that this deed of the 30th of *September* 1736 operated nothing in respect of the case in judgment; *Joseph Wilkins* having had the fee by descent before, subject only to the dower of *Catherine* his mother.

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wards died, leaving one only son, *John*, mentioned in the will of *Ann Jones* hereafter stated; which *John* died in 1788, leaving the lessor of the plaintiff his only son. On the death of *Catherine Wilkins* in 1740 her daughter, *Ann*, entered upon the premises and kept possession adversely against her brother *Joseph* until her death, without issue, in 1779. *Ann* married *Reece Jones*, who by his will, dated 12th *January* 1763, bequeathed to his said wife *Ann*, whom he appointed executrix, all his real and personal estate; and soon afterwards died; and on 16th *June* 1768 she proved his will at *Gloucester*. By indenture of the 28th of *Feb.* 1770, between *Selwyn James*, sole executor of the said *Ann Anderson*, widow, of the one part, and the said *Ann Jones*, widow, devisee and sole executrix of *Reece Jones* of the other part; reciting the abstracted indentures of mortgage or assignment of the 18th of *March* 1728, and 19th of *September* 1732, and that default was made in payment of the principal sum of 30*l.* and interest there mentioned, and that there was due to *Ann Anderson* 50*l.* for principal and interest, which *Reece Jones* in his life time had paid to her; but that no assignment was ever made by her of her estate and interest in the premises by virtue of those indentures to *Reece Jones*; and that *Ann Jones*, being entitled under his said will to take an assignment thereof, had requested *James*, in whom such term estate and interest was then vested, as executor of *Ann Anderson*, to assign the same to her, *Ann Jones*, which he had consented to do; *James* therefore assigned the premises to *Ann Jones* her executors, &c. for the residue of the said term of 999 years. *Ann Jones* by her will of the 11th of *September* 1771, duly executed and attested to pass real estate, devised as follows; "I give and bequeath unto *Thomas Cooper* for life, all my *leasehold* estate situated

situated on *Tutshill*, commonly called the *Star*, consisting of one dwelling house and stable, one piece of meadow, orchard, and garden. I also give unto the said *T. Cooper* all my household goods, beds, &c. and all utensils of brewing, and other my *goods* and *chattels*, moveable and unmoveable, together with all such sums of money as may be due to me at the time of my decease. And after his decease I give and bequeath unto *Jane Prickett* all the above *leasehold* estate, with all such furniture as shall remain after *T. Cooper*'s decease, to her and to her *heirs* and assigns for ever. But if *Jane Prickett* die before *T. Cooper*, or if she die without *heirs from her body* lawfully begotten, then I will my leasehold estate only unto *John Wilkins*, son of *Joseph Wilkins*, to him his heirs and assigns for ever. But if *John Wilkins* die before he comes to *lawful* possession of it, or die without issue of his body lawfully begotten, I will it descend unto *S. Tovey*, his heirs and assigns for ever. And after the deceafe of *Tho. Cooper* and *Jane Prickett*, and on the accession of *John Wilkins* to my leasehold estate, that my household goods shall be equally divided between *Catherine* and *Martha Tovey*." And she appointed *Tho. Cooper* her executor; who after her death duly proved the will, and took possession of the premises in question. The premises described in the said will as *leasehold* are those now in question. *Jane Prickett* married *James Williams*; and by indenture dated 20th of *August* 1788 *Cooper* demised the premises to *Williams* and his wife for 21 years, if he, *Cooper*, should so long live, at the yearly rent of eleven guineas. By indenture tripartite of the 10th of *March* 1789, between *Thomas Cooper*, administrator with the will annexed of *Ann Jones*, of the first part, *James Williams* and *Jane* his wife, formerly *Jane Prickett* of the second part, and *J. Seys* of the third

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third part; reciting the indenture of the 28th of *February* 1770, therein taking notice of the indenture of mortgage of the 18th of *March* 1728, in which are recited the indentures of the 25th of *September* 1768 and 19th of *September* 1732, and the other matters therein recited; and reciting the death of *Ann Jones*, and her said will, and the said indenture of lease dated the 20th of *August* then last past; and that *James Williams* and *Jane* his wife having occasion to borrow 40*l.* *John Seys* had agreed to lend the same, with the approbation of *T. Cooper*, upon mortgage of the said abstracted premises; *Cooper*, *Williams* and wife, did thereby grant, bargain, sell, and assign to *Seys* all the said premises, and all the estate, &c. to hold to *Seys* his executors, &c. for the residue of the said term of 999 years, subject to a proviso that on repayment of the 40*l.* with interest on the 10th of *September* then next, *J. Seys* his executors, &c. would surrender or assign so much of the said term as should be unexpired to *Williams* and wife, their executors, &c. The 40*l.* mortgage money not being paid, *Williams* and wife by indenture of the 20th of *February* 1790, reciting the last abstracted deed, in consideration thereof, and of a further sum then paid to them, making in the whole 100*l.*, assigned the said premises to *Seys* for the residue of the term absolutely, and without any proviso for redemption, subject to the payment of the rent of eleven guineas a year to *Cooper* reserved in the lease of the 20th of *August* 1788. *J. Seys* took possession of the premises, and considerably improved them; and from him the term was regularly, by indenture of the 25th of *March* 1795 (reciting the indenture of the 25th of *September* 1678, and the other matters before mentioned,) assigned to *S. Stephens*, who on the 2d of *July* 1797 made the defendants his executors, and died,

died, and they are now in possession. *Tho. Cooper* died in 1791; and *Jane Prickett* died, without issue, in 1795. *James Wilkins* the lessor of the plaintiff is the eldest son and heir of *John Wilkins*, the devisee named in the will of *Ann Jones*, and is also the heir at law of *William Wilkins* the grantee in the indentures of the 25th and 26th of *September* 1678, and of *Ann Jones* the testatrix. The release of the 26th of *September* 1678, and the deed of the 30th of *September* 1726 were produced by the lessor of the plaintiff. The other conveyances stated were in the possession of and produced by the defendants. If the Court were of opinion that the lessor of the plaintiff was entitled to recover the premises in question the verdict was to stand: otherwise a nonsuit was to be entered.

This case first came on to be argued in the last term, when it was ordered to be amended; and afterwards in the same term it was argued by *Wigley* for the plaintiff, and *Gaselee* for the defendant, when several points were made;

1st, Whether the mortgage term of 999 years created by the indenture of lease of the 25th of *September* 1678 were merged in the fee granted to *W. Wilkins* by the indenture of release of the 26th of *September*: against which *Shep. Touch.* 324. was cited. 2dly, If merged, whether the old term were not revived and assigned by the deed of the 18th of *March* 1728, noticing it as an existing term, and conveying it as such from *W. Wilkins* and *Catherine* his wife to *Ann Anderson*, as a mortgage security: or whether the words "*grant, bargain, sell, assign, and set over,*" though purporting to be an assignment of the old term, would not, if that were merged, operate as a new grant or re-creation of the term, by reference to the former, for the residue

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of the years to come: and this seemed to be conceded. 3dly, Whether upon the death of *Catherine* the survivor of *W. Wilkins* in 1740, and the rightful fee having at all events descended to *Joseph* the eldest son and heir at law of *Catherine Wilkins*; his sister *Ann*, who then entered and kept possession adversely against her brother until her death without issue in 1779, did not thereby acquire a tortious fee by disseisin, (as in *Lit. s.* 411.) notwithstanding the existence of the outstanding mortgage term to *Ann Anderson*, to whom *Ann Wilkins* continued to pay the interest on the mortgage, and therefore, it was said, must be taken to have continued in possession with the assent of the mortgagee, and during which term the brother could not have recovered in ejectment. 4thly, Whether, if she did acquire such tortious fee by disseisin in 1740, the assignment of the outstanding mortgage term to her (then called *Ann Jones*) in 1770 by *Selwyn James*, the executor of *Ann Anderson* the mortgagee, did not merge the term in the fee; as the term and the fee could not, it was argued, exist together in the same person in their own right. And in *Co. Lit.* 338. *b.* it is said that a man cannot have a term for years in his own right, and a freehold in auter droit, to consist together; but he may have a freehold in his own right and a term in auter droit. Or, 5thly, whether a rightful term could merge in a wrongful fee. Or, 6thly, whether *Ann Jones* having a rightful and a wrongful title to the possession, she might not have elected to hold, and may therefore now be presumed to have held, by her rightful title; more especially as by her will she describes the premises as leasehold, which was according to her right in them.

But ultimately it became unnecessary to decide these points: for the case was resolved into this; either the

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estate in *Ann Jones* at the time of her death was leasehold or freehold. If leasehold, it was agreed that the defendants were entitled, claiming under those who were competent to convey it as such. If freehold, the question turned on the devise over in the will of *Ann Jones* to *John Wilkins* (the father of the lessor of the plaintiff) *if* Jane Prickett *died before* Thomas Cooper (the first taker for life under *Ann Jones'* will), *or* if she died *without heirs of her body*. And *Jane Prickett* having died without issue in 1793, but having survived *Thomas Cooper*, who died in 1791, the principal question was whether that devise over took effect: and which depended upon another question, whether the word *or* were to be read *and*: in other words, whether both the events, of *Jane Prickett* dying before *Tho. Cooper*, *and* of her dying without issue, must happen before the remainder over to *John Wilkins*, could vest? In respect to which *Lawrence* J. in the last term referred to *Fairfield* v. *Morgan* (*a*) in the House of Lords, where, in a devise nearly similar, *or* was read *and*, and where all the cases on the subject are collected.

Wigley for the lessor of the plaintiff, (assuming for the purpose of the argument, that the old mortgage term for 999 years, created by the deed of demise of the 29th of *September* 1678, was merged in the fee released to *Wm. Wilkins* by the indenture of the 26th of *September*; or if it were revived, or a new mortgage term created by the deed of the 18th of *March* 1728 for the benefit of *Ann Anderson* the mortgagee, that upon the assignment of it by her personal representative in 1770 to *Ann Jones*, who had then acquired a tortious fee by disseisin of her brother

(*a*) 2 *New Rep*. 38.

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30 years before, that term was again merged, and therefore that at the time of *Ann Jones* making her will she was seised in fee of the premises unincumbered by any outstanding term;) contended, 1st, that though the premises were described in the will as *leasehold*, yet the devisor having nothing but this *freehold* estate which is locally described, they would pass under this mistaken description; rejecting the word *leasehold* as surplusage; according to the rule in *Knotsford* v. *Gardiner* (a). 2dly, That the word *or*, in the devise over to *John Wilkins*, was to be read in its proper disjunctive signification; and that one of the events having happened, namely, the dying of *Jane Prickett without issue*, the devise over took effect. The case of *Fairfield* v. *Morgan* was a devise to the testator's brother of all his real and freehold estates: but in case his brother "should die before he attained the age of 21 years, or without issue living at his death," then to his mother in fee. And he endeavoured to distinguish the present from that case by saying, that here there was an apparent intent that neither of the devisees, *Jane Prickett*, or *John Wilkins*, should take any fee absolutely in the premises until they respectively came into possession. The only reason against such a construction is founded upon the supposition of an absurdity in supposing that the testatrix could intend that if *Jane Prickett* died before *Cooper*, leaving issue, such issue should not take, but the estate go over to *John Wilkins* on *Cooper*'s death: but there is nothing so absurd in such an intention as to render it impossible to suppose that it could exist, though the natural sense of the words used best convey such a meaning. A devisor may well intend to give an estate

(a) 2 *Atk.* 450.

in remainder to one relation, and if ſhe lived to come into poſſeſſion of it, then that her family, if ſhe had any, ſhould alſo have the benefit of it; but that if ſhe never came into the poſſeſſion at all, that it ſhould go over altogether to another relation who was the next more immediate object of perſonal regard. But admitting ſome inconvenience in this conſtruction, the reading *and* for *or* will not get rid of every inconvenience; for then if *Jane Prickett* ſurvived *Cooper*, but without having iſſue, (for in caſe of iſſue, it might be a queſtion whether ſhe would take more than an eſtate tail), ſhe might have ſold the eſtate, and deprived the deviſees over of their ſucceſſion; which was clearly againſt the intention of the teſtatrix.

The Court now thought it unneceſſary to hear *Gaſelee* contrà, on this part of the caſe.

Lord ELLENBOROUGH C. J. This caſe is governed by that of *Fairfield* v. *Morgan*, and the word *or* muſt be read copulatively, as *and*: the apparent intention of the teſtatrix being, that both the events, of *Jane Prickett*'s dying before *Thomas Cooper*, *and* of her dying without iſſue, ſhould concur, before the deviſe over took effect: and both did not concur; for ſhe ſurvived *Cooper*. Taking this therefore either as freehold or leaſehold property in the teſtatrix, the plaintiff is not entitled to recover. As leaſehold, there was a reſuſcitation of a term, by the words *grant*, *bargain* and *ſell*, as well as *aſſign*, in the mortgage deed of *March* 1728, to *Ann Anderſon*, which term afterwards came by aſſignment to *Ann Jones*, through whom a regular title is traced to the defendants. As freehold, conſidering *Ann Jones* to have acquired a tortious fee by an adverſe poſſeſſion ſince 1740, the title is out of the

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leſſor of the plaintiff; and the deviſe over to his father in the will of *Ann Jones* never took effect.

GROSE J. concurred in both views of the caſe; and added, that it was neceſſary to read *and* for *or*, in order to give effect to the intention of the teſtatrix; for otherwiſe if *Jane Prickett* had died before *Cooper*, leaving iſſue, the eſtate would have gone over againſt the manifeſt intent of the teſtatrix.

LE BLANC J. The property to be recovered in this ejectment is either freehold or leaſehold: if leaſehold, it is admitted that the leſſor of the plaintiff cannot take it. If freehold, then he claims it as heir at law to *John Wilkins*, the deviſee over in the will of *Ann Jones*. Taking it then to be freehold, though called leaſehold in the will, and that as freehold it would ſtill paſs, being deſcribed by its local name and parts, the teſtatrix firſt gives it to *Thomas Cooper* for life; and after his deceaſe to *Jane Prickett* and her heirs and aſſigns; but if ſhe die before *Cooper*, *or* if ſhe die without heirs of her body, then to *Wilkins* and his heirs. If this deviſe over has taken effect in the event which has happened, then the leſſor is entitled to recover. That depends on the conſtruction of the word *or* in that clauſe; whether it is to be read disjunctively, or conjunctively, as if the word *and* had been there written; becauſe as *Jane Prickett* ſurvived *Cooper*, and died without iſſue, if the eſtate were intended to go over on the happening of either alternative, it would ſtill go over to *Wilkins*. But there has been a long train of deciſions, ending with the late caſe of *Fairfield* v. *Morgan*, and particularly *Sowell* v. *Garnet* (*Moor* 422.) which is very like the preſent, where the Court have conſtrued

or

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or as *and*; because otherwise, if the prior devisee had issue, and died; as in *Sowell* v. *Garret*, before 21; or, as in this case, before *T. Cooper*; the issue, which was the object of the devisor's bounty before the devisee over, would not take at all: and therefore to prevent so monstrous an absurdity, as that, if *Jane Prickett* died the day before *T. Cooper*, the intention of the devisor in favour of her children would be defeated, the word *or* must be read *and*.

BAYLEY J. agreed that the word *or* must be read *and*, in order to effectuate the manifest intention of the devisor. The first object of her bounty, after *T. Cooper* to whom she only gave an estate for life, was *Jane Prickett*. If she survived *Cooper*, so as to live to occupy the property herself, the testatrix meant she should have the fee: but if she died in *Cooper*'s life time, in which case she could not occupy herself, but left children, the testatrix meant she should have the means of providing for those children, and therefore that in that event also she should have a fee. The devise over therefore was not to take effect in either event, if she lived to enjoy it herself, or if she left children to be provided for: whereas according to the plaintiff's construction, had she died before *T. Cooper*, leaving issue, the estate would have gone over to the remainder-man, without leaving her the means of providing for her children out of it; which was clearly contrary to what the testatrix intended.

Tuesday, May 10th.

KER *against* OSBORNE.

Where money in litigation between two parties has by mutual consent been paid over to a trustee, in trust for the party entitled, it can only be sued for and recovered from the stakeholder by the party entitled to it, and not from the original party who was indebted; though he agreed to wave all objections to form.

ASSUMPSIT for money had and received, and on the other common money accounts, and also on a special count, which stated that the plaintiff insured the defendant's freight of the ship *George* on a voyage from *Riga* to *London*, &c. for 150*l.*: that the ship being detained at *Riga*, under the *Russian* embargo, the defendant gave notice of abandonment to the insurers on the freight, and claimed a total loss: whereupon, in consideration that the plaintiff accepted the abandonment and agreed to pay a total loss upon receiving an assignment of the freight, the defendant promised to assign the freight for the benefit of the insurers thereof. It then stated that the plaintiff paid a total loss to the defendant; that the embargo was afterwards withdrawn, the cargo reloaded, the voyage performed, and the freight paid by the consignees: and then assigned as a breach, that the defendant *before* he abandoned the freight to the plaintiff, had abandoned the ship to other underwriters on ship, and afterwards assigned the ship to trustees as to 7-8ths in trust for the underwriters on ship, and as to the other 8th in trust for himself; whereby the trustees became entitled to the freight, and the defendant, though demanded, refused to assign, and became incapable of making any effectual assignment of it to the plaintiff. In another special count the breach was laid to be, that the defendant caused the freight to be payable and paid to other persons, and not to the underwriters on freight; and refused to assign and was incapable of effectually assigning the

the ſame to them. On the trial of the cauſe at the ſittings in *London*, a verdict was taken for the plaintiff for 150*l.* ſubject to the opinion of the Court on a caſe, the ſubſtance of which, ſo far as reſpects the only point on which any opinion was given, is as follows:

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The defendant, owner of the ſhip *George*, on the 28th of *June* 1800 chartered the ſhip by writing (not under ſeal) to *Roberts* and *Co.* of *London*, on a voyage to *Riga*, and back again, at a certain rate of freight per lading. On the 8th of *July* the defendant inſured the *ſhip* on the voyage out and home for 6000*l.*; and on the 16th of *July*, he inſured the freight on the ſame voyage for 2500*l.*, of which 150*l.* was underwritten by the plaintiff. The ſhip ſailed on the voyage and arrived at *Riga*, and was there detained under an embargo, after the greater part of her cargo was on board, which was afterwards unſhipped. On the 24th of *February* 1801 the defendant gave written notice of abandonment of the ſhip to the underwriters on ſhip, and demanded a total loſs; and they accepted the abandonment, and by a memorandum on the policy, dated the 27th of *February*, agreed to pay a total loſs, "on receiving from the owner "an aſſignment of 7-8ths of the ſhip," &c. which was equivalent to 7000*l.* the ſum inſured on her, to be paid on the firſt of *April*, by a bill at two months. On the 25th of *February* the defendant gave written notice of abandonment of the freight to the underwriters on freight, and demanded a total loſs; which they agreed to pay in like manner, by a memorandum on the freight policy dated the 27th of *February*, "upon receiving from "the owners an aſſignment of the ſaid freight." The plaintiff accordingly paid the amount of his ſubſcription

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to the defendant. On the 21st of *March* 1801 the defendant executed an assignment, by which he conveyed to *Broadley* and *Moxon* all his property, interest, and claims in and to the ship, in trust, as to 7-8ths for the underwriters on ship, at their request, and as to the other 8th for himself. And on the same day he executed to the same trustees an assignment of all his right, title, interest, and claims, legal and equitable, in and to the freight from *Riga*, &c. in trust for the underwriters on freight, with their privity and consent. But it did not appear which of these assignments was first executed. The underwriters on ship also paid the defendant as for a a total loss. In *May* 1801 the ship was liberated, the cargo reloaded and completed, and she returned home with and delivered the goods to the several consignees, who afterwards paid their full freight to *Moxon*, one of the trustees of the ship and freight, who still retains the same; *which payment was made to Moxon with the concurrence of each set of underwriters*. The plaintiff, at the time when he paid his subscription to the defendant, knew that the defendant had abandoned the ship to the underwriters on ship, and that he had assigned the ship to *Broadley* and *Moxon*, in trust as beforementioned; but it was not proved that he knew these facts at the time when he accepted the abandonment of the freight, and when the memorandum before-mentioned was made on the policy on freight. The parties agreed to take no advantage of form on either side, but to rest on the merits of their cases. The question was, whether the plaintiff were entitled to recover?

Richardson for the plaintiff, having stated the facts of the case, was asked by Lord *Ellenborough*, how, after the

two

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two parties had agreed that the money in dispute should be paid over to third persons, stakeholders, the plaintiff could sue for and recover it against the defendant who had so paid it over with his consent. This, his Lordship said, was a preliminary objection which appeared to be fatal to the action; and which precluded any discussion upon the merits of the case: and that the agreement of the parties to rest on the merits, and take no advantage of form, could not alter the case or bind the Court to give judgment on the merits, when there appeared to be a clear objection to the action itself. To this *Richardson* submitted that though this was a decisive objection to the count for money had and received, yet it was none to the special count, which went upon a breach of contract, in not paying the freight over to the underwriters.

LE BLANC J. The special count is also against you; for the refusal to assign the freight, as there alleged, is answered by the fact of its being assigned and afterwards paid to another with the plaintiff's consent.

Lord ELLENBOROUGH C. J. The question of right to the freight, upon the abandonment, between the underwriters on ship, and those on freight, cannot be decided in this action. It is a question of great importance and very proper for discussion when it comes before us unfettered by any preliminary objection. Perhaps it may be contended in the present instance that the assured is liable upon his engagement to both sets of underwriters. But the subject of this suit has by agreement of all parties been taken from the defendant and deposited in other hands: in those hands therefore it must be litigated.

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The breach of the contract complained of by the plaintiff is the non-assignment or non-payment to him of the freight; but if he agreed that it should be assigned or paid over to another, how can he complain of the breach of that contract. He must proceed against the stake-holder.

Bayley, J. The money was paid over by consent of all parties, and with knowledge of all the facts. No new fact is stated, which was kept back at the time from the knowledge of the underwriters. How then can the plaintiff now object to the payment over?

Per Curiam, Postea to the defendant.

Holroyd was to have argued for the defendant.

Tuesday, May 10th.

Doe on the Demise of Christiana Ellis *against* Ellis.

Under a devise of land to the testator's son *Joseph* his *heirs* and *assigns for ever*; but in case his son should *die without issue*, *then*, to go to the child of which his second wife was enfient; held that *Joseph* took an *estate tail*.

In ejectment for a messuage in *Leeds*, a verdict was taken, at the trial at *York*, for the plaintiff, subject to the following case. *Jacob Ellis*, being seised in fee (inter alia) of the premises in question, by his will duly executed, dated the 26th of *March* 1804, devised thus: "I give and devise unto my son *Joseph* his heirs and "assigns for ever all that messuage or tenement in *Leeds* "in his own occupation: but in case my said son *Joseph* "shall die without issue, *then* I give and devise the same "messuage unto the child or children with which my "wife is now enfient, his or her heirs and assigns for "ever." A copy of the will was annexed to the case; but no other part of it was considered to be material to the question.

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Doe, dem. Ellis, *against* Ellis.

The testator had two wives; by his first he had his son *Joseph*; by his second he had *Christiana* the lessor of the plaintiff, with whom his second wife was enseint at the time of making his will. *Joseph* the son survived the testator and entered into the premises, and died; leaving *Jacob* his son and heir him surviving; who entered and died without issue; leaving *Joseph Ellis*, his paternal great uncle, his heir at law; who claims the premises, and defends the ejectment, in the name of *Mary Ellis* the tenant. *Christiana*, the daughter of the testator by his second wife, claims the premises under the above devise. The question was whether she were entitled to recover? if she were, the verdict was to stand; if not, a verdict was to be entered for the defendant.

Littledale for the plaintiff contended that *Joseph* the son, to whom and his *heirs* and assigns the estate was given, only took an estate tail by force of the subsequent words in the limitation over, "in case my said son *Joseph* shall die "*without issue*, which restrained the word, "*heirs*" to *heirs* "*of the body.*" Therefore, on the death of *Joseph*'s son, *Jacob*, without issue, the limitation over to the lessor of the plaintiff, *Joseph*'s sister of the half blood, took effect. And he referred to *Parker* v. *Thacker* (*a*), *Webb* v. *Herring* (*b*), *Nottingham* v. *Jennings* (*c*), *Tyte* v. *Willis* (*d*), (in addition to which Lord *Ellenborough* mentioned *Brice* v. *Smith*, as reported in *Willes* 1.) and particularly to *Roe* d. *Scott* v. *Smart* (*e*), as being directly in point to the

(*a*) 3 *Lev.* 70. (*b*) *Cro.* *J* 415. (*c*) 1 *Pr. Wms.* 23.

(*d*) *Cas. Temp. Talb.* 1 and vi. *Lewis* v. *Waters*, 6 *East*, 336.

(*e*) *C. B. Easter* 27 *G.* 3. reported in the last edition of *Fearne's Exec. Dev.* 203, edited by Mr. *Powell.*

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present case. The testator there devised different lands to each of his sons, *James*, *John*, and *Thomas*, to hold to each, his "*heirs and assigns* for ever;" and if either of his three sons should die *without issue of his or their bodies*, then the estate or estates of such sons to go to the survivors or survivor; and if all his sons should die without issue, then to his four daughters and their heirs and assigns for ever. The three sons survived the testator and entered, and *John* died afterwards unmarried: and held that *Thomas* took an estate tail, which descended to his daughter; and on her death, without issue, the estate went over to *James*, and not to the heirs of the daughter to whom *James* was only related of the half-blood.

Holroyd, contrà, contended that the limitation to *Joseph* and his heirs, and in case he die without issue then over, gave *Joseph* a fee determinable on a particular event; not on an unlimited failure of issue, but on his dying without issue at the time of his death; which event did not happen, and therefore, the devise over never took effect. This case is distinguishable from all the others but the last. In general the cases have been where after a devise to one and his heirs, the limitation over has been, in case he died without *heirs*, to one who might be *his heir*; where it was manifest that by the word *heirs* was meant *heirs of the body*: but this does not apply where the limitation over is to one of the half-blood, who could not be heir to the first taker. Without entering into the distinction between real and personal property, in construing the words *dying without issue*; whether to be taken as a general failure of issue, or to be confined to the time of the death; which distinction is commented upon by Lord C. J. *Wilmot*

Wilmot in *Keiley* v. *Fowler* (*a*), and by Lord *Kenyon* in *Porter* v. *Bradley* (*b*); it is now settled, that even in the case of real property any slight circumstance which shews an intent in the testator not to use the words *die without issue* in their strict legal sense, as importing a general failure of issue at any future time, will restore them to their natural sense, as purporting a *dying* without issue, *at the time of the death* of the first taker. This also appears from *Wilkinson* v. *South* (*c*), and *Hockley* v. *Mawbey* (*d*). Now here the intention of the testator clearly was, that *Joseph* should take a fee if he had issue; for he uses the word *then*, which must refer to the time of the death. Again, the devise is not merely to him and "his *heirs*," but to him and his heirs *and assigns* forever;" giving him, therefore, an *assignable* estate. Now an estate tail is not an *assignable* estate; for it only endures while there are heirs of the body of the first taker. He was to take a fee in all events, except that on which the estate was given over, namely, if he had no issue living at the time of his death. The only direct authority against this is *Roe* d. *Scott* v. *Smart*, of which there does not appear to be any professed note of what passed in Court; but the account of the case is collected from Mr. *Fearne*'s papers and opinions. It, appears however, that the testator was there parcelling out his estate amongst his sons, and regulating the succession from one to another, so as to preserve the whole in the family: and therefore could not intend that they should take the fee.

(*a*) *Wilmot's Rep.* 298.

(*b*) 3 *Term Rep.* 146. and vi. *Roe* v. *Jeffery*, 7 *Term Rep.* 589.

(*c*) 7 *Term Rep.* 555. (*d*) 3 *Bro. Ch. Cas* 82.

Lord

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Lord Ellenborough, C. J. The general rule is clear, that the words "in case my said son *Joseph* shall die without issue," must be construed to mean a general failure of issue. And according to the opinion of Lord *Thurlow* in *Bigge* v. *Bensley* (*a*), "the general words are to be varied only by circumstances arising on fair demonstration." Lord *Thurlow* said that there were not less than 57 cases upon this point, and that to call "dying without "*leaving* issue" the natural sense of "dying *without* issue," is against all the cases. And he referred to *Dormer* v. *Beauclerk* (*b*) as deciding that the word *then*, which was merely a word of relation, and not an adverb of time, made no difference. That is extremely decisive against the only word upon which originally any argument could have been built. For as to the word *assigns* which follows *heirs*, we cannot collect any different intention from the addition of it, than if the word *heirs* alone had been used. Whether an estate be given to a man and his heirs, or to him and his heirs and assigns, must be the same thing in legal construction. The estate then being at first given to *Joseph*, his heirs and assigns for ever, would have given him the fee; but the premises however large may be restrained by the context; as premises, however narrow, may be enlarged by it. Here then the testator goes on to say that "in case *Joseph* shall die *without issue*, then," he gives it over to the child which his (the testator's) wife is enseint with; which clearly gives *Joseph* only an estate tail; according to *Brice* v. *Smith*, where all the cases are collected; among others, *Altham*'s case (*c*), in which the same rule is applied to deeds; as

(*a*) 1 *Bro. Ch. Cas.* 190. (*b*) *Willis*, 1. (*c*) 8 *Co.* 154. *b.*

"if

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"if a man give land to one and his heirs, habendum "to him and the heirs of his body, he ſhall have but an "eſtate in tail, and no fee expectant; for the habendum "qualifies the general words precedent." And ſo it was ſaid by Lord Keeper *Wright* in *Bamfield* v. *Popham*(a), "that where in the premiſes an eſtate is given by deed "to one and his *heirs*, and if he die *without iſſue*, &c.;" theſe words are ſufficient to reſtrain the former words, and turn the fee into an entail. If ſuch would be the effect of the latter words to reſtrain the former in a deed, I ſee no reaſon why they ſhould not have the ſame effect in a deviſe: and then according to all the caſes, *Joſeph* the ſon took only an eſtate tail; which being now ſpent, the leſſor of the plaintiff is entitled to recover.

GROSE, J. It is impoſſible to read the will without ſeeing, that the teſtator intended that if *Joſeph* had iſſue, that iſſue ſhould take; and that if he died without iſſue, the iſſue of which the ſecond wife was enſeint ſhould take the eſtate: and this intention can only be effectuated by giving *Joſeph* an eſtate tail.

LE BLANC and BAYLEY, Juſtices, concurred in opinion that neither the word *then*, nor the word "*aſſigns*" were ſufficient to ſhew an intention in the teſtator to uſe the words, "in caſe my ſaid ſon *Joſeph* ſhall *die without iſſue*," in any other than their acknowledged general legal ſenſe; or to except this out of the general current of authorities.

Poſtea to the plaintiff.

(a) 1 *Pr. Wms.* 57. note.

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A married woman pregnant in the absence of her husband with a child, which when born would by law be a bastard, is removeable as an unmarried woman under sect. 6. of stat. 35 *G.* 3. *c.* 101. and the presumption of her being chargeable arises by the same clause from the bare fact of being with child of a bastard, if no circumstances be stated to shew that such presumption is not applicable to a person in the particular situation of the party coming within the general description of the clause. And the order of removal may charge such a person generally as actually chargeable, without setting forth in what manner chargeable.

UPON complaint of the parish officers of *Diss* in *Norfolk* "that *Rebecca Knowles*, *wife* of *John Knowles*, lately came to inhabit in *Diss*, not having gained a legal settlement there, "and that the said *Rebecca Knowles* is actually become chargeable to the said parish of *Diss*;" two justices "upon due proof made thereof, as well upon the examination of the said *R. K.* upon oath as otherwise, and likewise upon due consideration had of the premises, adjudged the same to be true," and likewise adjudged the lawful settlement of the said *Rebecca* to be in *Tibbenham* in the same county: and so they conclude their order of removal in the common form. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on a case, stating, that the pauper's husband *John Knowles*, being settled in *Tibbenham*, went to the *East Indies* four years ago, and has never returned. That at the time of the removal the pauper was residing in *Diss*, and pregnant of a child, which has since been born a bastard in *Tibbenham*. That the pauper never received any relief from *Diss* parish, nor was chargeable in any other manner than as above mentioned.

This case was first argued by the appellant's counsel in the last term, when the Court were agreed in confirming the order: but a question of the like nature having occurred in the case of *The King* v. *Diddlebury* (*a*), which was then argued, and directed to stand over for consideration;

(*a*) Vide the next case.

the

the Court, upon a suggestion that a similar question might arise upon the face of the order of removal, which by mistake had not been returned with the case, directed this case also to stand over, to be spoken to again in this term; and in the mean time that the original order should be regularly returned.

Frere now argued in support of the orders; and referred upon the first point to the opinion delivered by the Court in the last term; that the pauper, though a married woman, yet being pregnant of a child which by law was a bastard, was capable of being removed as an *unmarried* woman for this purpose, within the provision of the 6th sect. of the stat. 35 *Geo.* 3. *c.* 101. And in addition to the cases after mentioned, he referred to *The King* v. *Luffe* (*a*). The next and principal question, on which the case had been directed to stand over, was, whether the pauper could be said to have been actually *chargeable* to the parish from the mere circumstance of her having been pregnant with a bastard at the time. As to which the words of the statute are express, "that every unmarried woman with child shall be deemed and taken to be a person actually chargeable, within the intent and meaning of the act." The case is also within the reason of the act: for before the passing of it such a person was removeable as likely to become chargeable, not merely on her own account, but on account of the permanent burthen of maintaining the child, which the law presumes is likely to become chargeable to the parish where it is born (*b*). When the stat. 35 *G.* 3. passed, which altered the principle of removals, confining them to cases where the paupers were actually chargeable, the necessity of this

(*a*) 8 *East*, 193.
(*b*) *Rex* v. *Matthews*, *Salk.* 478.

provision

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provision was obvious; otherwise the parish to which the mother belonged would have relieved her in the parish where she resided until after her delivery, in order to settle the bastard there. In the case of *The King* v. *Great Yarmouth* (*a*), which turned on the form of the order, it was not even adjudged that the pauper was chargeable, as a fact; but only that she was with child, which was likely to be born a bastard, and "that she was *deemed* to be a person actually chargeable," &c.; and without negativing her having a certificate; which the Court held to be unnecessary, as a certificated person in that situation was liable to be removed under the late act. The case of *The King* v. *Alveley* (*b*), which will be relied on, e contrà, is distinguishable from this in several respects; 1st, the order, after stating that *J. H. single woman* was with child, and was *therefore* deemed chargeable, &c., adjudged the premises to be true; stating it, therefore, merely as a conclusion of law, and not as an adjudication of the fact. 2dly, The circumstances of the case rather shewed that she was a person of sufficient substance and ability to provide for herself. But, 3dly, the principal ground of the decision was, that being in the service of her master under a contract of hiring for a year, she was not removeable at all against the consent of the contracting parties; according to the cases of *Rex* v. *Marlborough* (*c*), *R.* v. *Brampton* (*d*), and *R.* v. *Ozleworth* (*e*). Primâ facie, at least, the circumstance of a woman being pregnant with a bastard raises a presumption by the statute that she is actually chargeable, and liable to be removed; and if there be any facts which go to rebut that presumption, it lies on the appellant parish to shew them: as where a *wife*,

(*a*) 8 *Term Rep.* 68. (*b*) 3 *East*, 563. (*c*) 12 *Mod.* 402.
(*d*) *Cald.* 11. (*e*) *Burr. S. C.* 302, 4.

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as ſuch, is removed without her huſband, it is not neceſſary for the removing pariſh to ſhew the huſband's conſent; but it lies on the appellants to ſhew his diſſent (*a*).

Bowen, contrà, relied principally upon the caſe of the *King* v. *Alveley* (*b*), where the ſtat. 35 *G.* 3. had been expounded not to extend to make perſons removeable, who were not proper objects of removal before that ſtatute, as being likely to become chargeable; but only to enable the magiſtrates to remove women pregnant with baſtards, as actually chargeable, and therefore removeable within the principle of that law, if in other reſpects fit objects of removal; and that a ſingle woman with child was not *therefore* and neceſſarily to be deemed chargeable, without more. If then the condition of ſuch a perſon only determines her removeability, and not that ſhe ought *therefore* to be removed, it was not incumbent on the appellants in the firſt inſtance to prove her ſubſtance or ability to maintain herſelf, or the like, in order to rebut the preſumption of her being in fact likely to be chargeable; but the onus probandi lay upon the reſpondents in this as in all other caſes, to ſhew that the pauper was a fit object of removal. Here, however, it is expreſsly ſtated, that the pauper *never received relief* from the pariſh, *nor was chargeable in any other manner than as above mentioned*; that is, by being pregnant with a baſtard: which rebuts the preſumption of her being then chargeable otherwiſe than in this qualified ſenſe.

Lord ELLENBOROUGH C. J. The firſt queſtion is whether a married woman, who, in the abſence of her huſband

(*a*) *St. Michael* in *Bath* v. *Nunny*, 1 *Stra.* 544.

(*b*) 3 *East*, 563.

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husband abroad, is pregnant under such circumstances as that the child when born would be deemed by law a bastard, be liable to be removed under the act of the 35 *G.* 3.? The act indeed says, "that every *unmarried* woman with child shall be deemed and taken to be a person actually chargeable within the true intent and meaning of the act," and removeable: but the legislature plainly had in view that every woman pregnant of a child, which was not protected by the matrimony of its parents, but would when born be a bastard, should be removeable, whether married or unmarried: for though the mother were married, yet if her child would by law be a bastard, she was in pari jure, within the scope of this act, with an unmarried woman who was pregnant. The next question is, whether the order of removal be good in the form of it? It states the complaint of the parish officers of *Diss*, that *Rebecca*, the wife of *John Knowles*, is *actually become chargeable* to their parish, &c.; and the justices upon due proof made thereof adjudge the same to be true. The act says, that a woman under the circumstances I have stated "shall be *deemed and taken* to be a person *actually chargeable*," &c. Have not then the justices done enough in stating that the pauper was "actually become chargeable to the parish?" They are to draw the conclusion whether chargeable or not, and it is enough for them to state that conclusion upon the face of the order, without stating the premises on which it was founded. If that conclusion be disputed the party is to appeal; and such appeal having been made and the facts stated to us, it is to be seen, thirdly, whether the premises warranted the magistrates in drawing that conclusion. The legislature intended that an unmarried woman, or, what is the same for this purpose, a married woman

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under the circumſtances I have mentioned, being with child is primâ facie chargeable within the law: it raiſes a preſumption of her being chargeable. But I ſay again, as I ſaid before in the *King* v. *Alveley*, that if it appear that the woman is a perſon of ſubſtance, and that there is no pretence to ſay, that ſhe is likely to bring a burthen upon the pariſh, the act did not intend to make ſuch a perſon liable to be removed. But it is made a preſumptive chargeability, ſo as to put it on the party diſputing it to ſhew that ſhe is a perſon of ſubſtance, or, as in the caſe of the *King* v. *Alveley*, a perſon under a contract of hiring and ſervice with another at the time, ſo as to rebut the preſumption. The only caſes that materially affect the conſtruction of the clauſe in queſtion are, firſt, *Rex* v. *St. Mary Weſtport* (*a*), which was the caſe of a certificated perſon, who under the ſtat. 8 and 9 *W.* 3. *c.* 30. was not removeable till actually chargeable: and it was held that one of the family of the certificated perſon, being pregnant of a child likely to be born a baſtard, was not removeable under that act. The queſtion was again made in the caſe of the *King* v. *Great Yarmouth* (*b*), after the paſſing of the ſtat. 35 *G.* 3., where the reſidence of a perſon ſo circumſtanced under a certificate was held to be no objection to her removal. It is not neceſſary here to affirm or to diſaffirm that caſe, as it related to the certificate act. Then came the caſe of the *King* v. *Alveley*, where the principal point decided was that a ſingle woman being with child did not operate ſuch a diſſolution of the contract of hiring and ſervice, as to make her removeable againſt the conſent of herſelf and her maſter. The Court alſo ſaid, I have no doubt, what is ſtated in the

(*a*) 3 *Term Rep.* 44.

(*b*) 8 *Term Rep.* 68.

 report,

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report, respecting persons of substance not being within the view of the act of the 35 *Geo.* 3. But there is one observation attributed to me with which I cannot charge my recollection, and which at any rate, I am not prepared to abide by, namely, that where the act says, that such a person *may* be removed; it does not say that she *shall* be so. Now I do not think that the use of the word *may* there, as contradistinguished from *shall*, makes any difference in the sense. If the party come within the true intent and meaning of the clause as there described, I think the true reading of the words "*may* be removed," is that she "*shall* be removed." All the statutes respecting the removal of the poor form together one system of law, and it is a condition precedent, if I may so say, that the persons to be subjected to their operation should be in the condition of poverty. When therefore the clause in question says that unmarried women with child shall be deemed to be actually chargeable, &c. for the purpose of subjecting them to be removed, it means that persons so situated shall primâ facie only be deemed to be chargeable, and it still leaves it open to shew that the party is of substance, so as not to be within the scope and view of the poor laws. Therefore, whether in the form of the order it be said that the woman so circumstanced is deemed to be chargeable, or is therefore chargeable, or that she is chargeable, it is all alike, and equally good; and she must be presumed to be in the situation in which she is considered by the legislature as being, namely, as actually chargeable to the parish where she is inhabiting, and consequently liable to be removed, unless the contrary be shewn. Here then it is sufficiently adjudged in the order that the pauper was actually chargeable, so as to make her removeable under the act: and it appearing by

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the facts stated on the appeal, that though married, yet that her husband was abroad and could not have been the father of her child; this was a primâ facie case to bring her within the 6th clause, and to shew that she was actually chargeable within the meaning of the act: and nothing being shewn to rebut that presumption, it remains presumptively established that the pauper was within the description of persons liable to be removed.

GROSE J. Looking to the general policy of the poor laws, and to the object of the last statute, we can only consider the being pregnant of a bastard as a primâ facie presumption of the woman being chargeable within the meaning of the 6th clause. Then I look to see whether there be any thing stated in the case to rebut that presumption; and nothing of that sort appearing, it is not inconsistent with any of the former decisions to say that this woman was removeable.

LE BLANC J. This question turns on the construction of the 6th clause of the stat. 35 *Geo.* 3. *c.* 101., and the single point is whether upon the fact stated in the order of removal, that *Rebecca* the wife of *John Knowles*, the person removed, was actually become chargeable to the parish, coupled with the facts stated in the case, shewing in what way she became chargeable, she were liable to be removed. The justices by their order adjudge her to be chargeable; and the sessions on appeal state her situation to be this, that she was the wife of a man who four years before had gone to the *East Indies*, from whence he had never returned; and that at the time of the order made she was pregnant of a child, which had since been born a bastard; and they further add, that she had never

 received

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received any relief nor was in any other manner chargeable to the removing parish than as before mentioned. The sessions then confirm the order of the justices adjudging her to be chargeable, and removing her; and they do not state any thing in their case to shew that she was not removeable. The stat. 35 *G.* 3. was passed to prevent persons in general from being removed until they were actually chargeable; but contemplating the inconvenience which would result from the generality of this provision in the instance of unmarried persons being with child, where for the most part there was every probability of their becoming chargeable to the parish in which they were delivered, and which would be burthened with the maintenance of the bastard when born; they adopted the high degree of probability existing in most instances as a foundation for a general rule; and therefore enacted by the 6th section "that every unmarried woman with child should be deemed and taken to be a person actually chargeable within the true intent and meaning of the act." The first question then is, whether the pauper, who is a married woman, but whose husband, being absent in the *East Indies* before and during the time of her pregnancy, could not by possibility be the father of her child, come within the description in this clause? Literally, she does not: but I think she does come within the meaning of the act, being pregnant with a child, which could not possibly have been begotten by her husband, and which has been since born a bastard: and therefore this is not like a case of doubtful issue, where it may admit of question whether the child with which a married woman is pregnant will when born be a bastard; but it is the case of a removal of a married woman under circumstances where by no possibility the child with

which

which ſhe was pregnant could be any other than a baſtard. Looking therefore to the meaning of this law, and to former analagous deciſions, I think ſhe was an *unmarried* woman for this purpoſe. Then the only queſtion is, whether ſhe were chargeable? Now I cannot enter into any ſpeculative reaſoning to ſhew that ſhe was not in fact chargeable, when ſhe is ſtated or deſcribed to be ſuch a perſon as the legiſlature have ſaid ſhall be deemed and taken to be actually chargeable. How far facts may be adduced (I will not ſay to rebut the preſumption that ſuch a perſon is chargeable) to ſhew that the perſon to be removed is not an object of the poor laws, as in the caſe of the *King* v. *Alveley*, will be fit to be decided whenever the queſtion ariſes upon a caſe in judgment before us. It is ſufficient to ſay that nothing appears here to ſhew that this woman was not an object of the poor laws.

BAYLEY J. Before the ſtat. 35 *G.* 3. every perſon likely to become chargeable was liable to be removed: that ſtatute altered the law in that reſpect, and provided generally that no perſon ſhould be removeable till actually chargeable: but by the 6th ſection it alſo provided that every unmarried woman with child ſhould be deemed to be a perſon actually chargeable. Now the narroweſt conſtruction which can be put upon thoſe words is that an unmarried perſon likely in fact to become chargeable ſhould be removeable as before; and that the fact of ſuch a perſon being with child was at leaſt intended to be made primâ facie evidence of being chargeable: that preſumption therefore ought to have been, if it could have been, rebutted by the party reſiſting the removal. If the mother had died in child-birth the charge of maintaining the child would have been thrown entirely on the pariſh;

for

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for her next of kin would have been entitled to take all her personal property. Then considering that there is nothing stated in the case to shew that the mother was in a condition to maintain her child, or that any other provision was made for it, we cannot come to any other conclusion than that she was chargeable within the meaning of the act. And I also agree that she must be considered as an unmarried woman within the meaning of the same clause; the child being a bastard by law, and the husband not under any obligation to provide for it.

Both orders confirmed.

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An order of removal founded on the stat 35 *G.* 3. *c.* 101. *s.* 6. stating that *A E.* *single woman* was "*by being* "*pregnant deemed* "*to have be-* "*come charge-* "*able*," &c, is good.

UPON the complaint of the parish officers of *Tipton*, in the county of *Stafford*, "that *Ann Evans*, *single woman*, had come to inhabit in the said parish of *Tipton*, not having gained a legal settlement there, nor produced any certificate owning her to be settled elsewhere, and *is*, *by being pregnant, deemed to have become chargeable to* the said parish of *Tipton*;" two justices, "upon due proof made thereof, as well upon the examination of the said *Ann Evans* upon oath, as otherwise, and likewise upon due consideration had of the premises, did adjudge the same to be true, and that the lawful settlement of the said *Ann Evans* was in the parish of *Diddlebury* in the county of *Salop*," &c. The sessions, on appeal, found, specially, that the pauper *Ann Evans*, being a single woman legally settled in *Diddlebury*, and becoming *actually chargeable to* Tipton, within the meaning of the statute (35 *G.* 3. *c.* 101. *s.* 6.), *by being pregnant with a child* who

had

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had since been *born a bastard*, was removed from *Tipton* to *Diddlebury*; and that the pauper appeared to be *a labourer, without substance*, the mother of other bastard children, and not a hired servant, was properly removed *as actually chargeable*; therefore they confirmed the order of removal.

This case came on to be argued in the last term after the case of the *King* v. *Tibbenham* (*a*), when *Peake* and *Pettit* were heard in support of the orders, and *Jervis* and *Clifford* against them. These latter contended that after the case of the *King* v. *Alveley* (*b*), it ought to have been alleged on the face of the order of removal, that the pauper was actually chargeable in fact, and not merely as an inference of law from the fact of her being pregnant; since that inference did not arise from the mere fact of pregnancy, without other circumstances shewing that the pauper was in such a situation as before the act of the 35 *Geo.* 3. would have made her liable to be removed as a person likely to become chargeable: and that this defect in the order could not be helped by the finding of the sessions (*c*) in the case, that she was a labourer, without substance, &c. The case was then directed to stand over for consideration with the antecedent one; and after the decision of that case,

Lord ELLENBOROUGH C. J. said that there was little more to add, with respect to this, than that the orders should be confirmed. On the facts of the case as bringing it within the general policy of the poor laws, and the words of the act of the 35 *G.* 3., there could be no doubt:

(*a*) The last case. (*b*) 3 *East*, 563.

(*c*) *Rex* v. *Great Bedwin*, *Burr.* S. C. 163.

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and with respect to the form of the order of removal, the premises are stated, as in the statute itself, from whence the conclusion is drawn; and therefore all is stated which the statute requires.

Both orders confirmed.

Tuesday, May 17th.

DOE on Demise of WIGHT *against* CUNDALL.

Under a devise of land to the two children of the testator's brother W. when they attained the age of 21 years; but the executor to account to them for the profits until the age of 21, or day of marriage: *but if either should die before 21,* the survivor to be *heir* to the other: Held that the fee passed, which would go over to the survivor in case one died under 21, and would descend or be disposable if he died after attaining 21: and that a devise of other land to the two children of another brother R. *on the same conditions as W.'s children,* was governed by the same construction.

THIS ejectment was brought for an undivided third part of four houses at *Wytham*, in *Essex*, mentioned in the bequest contained in *Richard Wight*'s will in favour of *Robert* and *Rebecca*, the two children of his brother *Robert Wight*. At the trial a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case.

Richard Wight, the testator, being seised in fee (*inter alia*) of the said four houses, by his will duly executed, dated the 6th of *September* 1771, devised thus: "Item, I give "and bequeath unto the two children, *Elizabeth* and "*Jemima*, daughters of my brother *William Wight* "deceased, the first four freehold houses next my dwell-"ing house, built by me in 1770, when they have at-"tained the age of 21 years. But the executor and "executrix shall be accountable for the profits of the "said houses unto the said children, until the aforesaid "age of 21 years, or the day of marriage. But if either "of them should die before the said age of 21 years, "then the survivor shall be *heir* to the other two houses. "Likewise I give and bequeath unto the two children, "*Robert* and *Rebecca*, son and daughter of my late brother "*Robert* deceased, the next four houses adjoining to the "same, *on the same conditions as my brother* William Wight's "*children.*" After some pecuniary legacies the will contains

contains the following residuary clause. "I give and 1808.
"bequeath all the residue and remainder of my effects or
"estate of what kind soever, both freehold, leasehold,
"cash, book debts, stock in trade, stock on the land, such
"as horses, &c. and all and every part of what shall be ow-
"ing to me at my decease, unto my brother *John Wight*,
"my sister *Mary Frument*, and my sister *Jemima Jones*,
"equally, share and share alike, between them; leaving
"it to their free will whether they will divide the free-
"hold and leasehold estate and annuity of *William Berks*
"in an equitable manner between them, or to sell the
"said estates and divide the money arising from the sale
"of the same." The testator died soon after the making his will; leaving *Robert* and *Rebecca* the son and daughter of *Robert Wight* the testator's brother, who were infants at the time of his death, him surviving, but who both lived to attain the age of 21. *Rebecca* intermarried with the defendant *John Cundall*, clerk, had issue by him, and died on the 21st of *June* 1806, before the day when the demise is laid. *Robert Wight* and *Rebecca*, the devisees of the four houses in question, entered into the receipt of the rents and profits thereof from the testator's death, and continued in such receipt until the death of *Robert*, who died some time since the intestate, leaving *Rebecca*, his sister, his heir at law. After his death, the defendant, *John Cundall*, in right of his wife *Rebecca*, entered into the possession of the four houses, and still continues so, claiming to be the tenant thereof by the curtesy. The three residuary devisees named in the will survived the testator. *John Wight*, one of them, has since died intestate; leaving the lessor of the plaintiff his eldest son and heir at law. The question for the opinion of the Court was, Whether *Rebecca Wight*, the daughter of the testator's brother *Ro-*

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bert, after the death of her brother *Robert*, had an estate for life only or in fee in the four houses above mentioned. The lessor of the plaintiff insisted that she had only a life estate; that the reversion, having passed under the residuary devise, fell in on the death of *Rebecca Cundall*; and that he is now entitled to one third of these premises as heir at law of *John Wight*.

Wetherell for the lessor of the plaintiff said, it was agreed that if the two children of the testator's brother *Robert*, viz. *Robert* and *Rebecca*, (who were to take *on the same conditions*, i. e. estates of the same nature, as *Wm. Wight's* children, the devisees of the first four houses,) took only life interests, the undisposed reversion passed under the residuary clause: in which case it was also agreed that the lessor of the Plaintiff was entitled to one-third. He then contended, that these children took only life estates in the premises, with a life estate in the whole to the survivor, by force of the devise that "the survivor shall be *heir* to the other." For that wherever the word *heir* is used in a will for the purpose of carrying over an interest which determined on the death of the first taker, the second only takes by way of *substitution*, and therefore only takes the same interest as the other had; according to *Spark* v. *Purnell* (*a*), and *Gynes* v. *Kemsley* (*b*), in which latter case however the question was adjourned. The will too is inartificially drawn; and the word *heir* in its popular sense imports *succession*, rather than the degree of interest which the person takes. It may be said however, that there is a difference where the first devise is to an infant, and if he die under age, then over to one who would be his heir; that the first taker attaining his full age will

(*a*) *Hob.* 75. (*b*) *Freem.* 293.

take

take a fee. But that ſtands only on a dictum of *Saunders* in his report of *Purefoy* v. *Rogers* (*a*), and is contradicted by *Fowler* v. *Blackwell* (*b*), where the point was adjudged otherwiſe.

Marryat, contrà, was ſtopped by the Court.

Lord ELLENBOROUGH C. J. Admitting that the word *heir*, as here uſed, is merely a word of ſubſtitution (an admiſſion which I would not be bound by generally,) ſtill there is enough in the will to indicate an intention in the deviſor, by the deviſe to his brother *Robert*'s children, *on the ſame conditions* as his brother *William*'s children, (by which muſt be underſtood that he deviſed the premiſes to *Robert*'s children in the ſame terms as the preceding deviſe,) namely, when they attained the age of 21 years, and the executors to be accountable to them for the profits in the mean time; and that *if either of them died before* 21, *the ſurvivor ſhould be heir to the party ſo dying*; that the party ſo dying ſhould have a fee, which ſhould go over to the ſurvivor in that event, or ſhould veſt abſolutely in the party attaining 21. Here then *Robert* the nephew, having attained 21, on his death the premiſes deſcended to his ſiſter *Rebecca*, his heir at law. What is ſaid at the concluſion of the caſe of *Purefoy* v. *Rogers*, as far as the opinion of a very learned man goes, is in ſupport of this conſtruction. But it does not reſt on that; for the ſubject was very fully and diſtinctly diſcuſſed in *Frogmorton d. Bramſtone* v. *Holyday* (*c*), where Lord *Manſfield*, commenting on ſimilar words, after a deviſe of pre-

(*a*) 2 *Saund.* 388. *a.* Vide *Moone* v. *Heaſeman*, *Willes*, 143 and *Robinſon* v. *Grey*, ante, 1.

(*b*) *Com. Rep.* 353. (*c*) 3 *Burr.* 1618.

miſes

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mises generally to *J. H.* the devisor's son, charged with the payment of 50*l.* out of the yearly rents; and *if* J. H. *shall die in his minority*, then over to her three daughters; says that those words, *If he should die under* 21, shewed her intention to give a fee: for if he lived to 21, he might then dispose of it himself: if he died before, he could not; and then she disposed of it. If *J. H.* was barely to take an estate for life, the time of his death must be immaterial to the devise over. But limiting it over only upon the contingency of his dying in his minority shews that she intended to give him an absolute estate in fee, which he might dispose of if he came of age: and unless he lived to be of age (when he might dispose of it,) she meant it should go to her daughters. The whole doctrine and effect of these words were there so fully stated, that it is unnecessary to add any further authority. But Lord *Mansfield* in another case (*a*) mentions a case of *Tomkins* v. *Tomkins* in *Chan. H.* 17 *G.* 2. where the devise was "to his brother in trust for his eldest son *B.* till he should attain 21; and if he should die before 21, then a devise over." The Court held the age of 21 to be no limitation of *B.*'s *interest*, but only a limitation of the *trust* during his minority, and that *B.* took the whole by implication. There are other authorities which might be cited, that a giving over on a dying before 21 shews an intention that if the party attain 21 he should have a fee absolute.

The other Judges concurring,

Postea to the Defendant.

(*a*) *Goodtitle* v. *Whitby*, 1 *Burr.* 234.

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ROE on the Demise of JOSEPH HUCKNALL and Others *against* FOSTER.

Tuesday, May 17th.

John Lealand surrendered a copyhold, in the occupation of him *John Lealand*, to the use of *Joseph Lealand* and *John Lealand his son*, for their lives and the life of the survivor; remainder to the heirs of the body of the *said* John Lealand *son of Joseph L.*; remainder to the right heirs of *the said* John Lealand: held that the ultimate remainder was meant for the right heirs of *John* the surrenderor, as well because *John* the surrenderee is before described with the addition of *the son of Joseph*; as of the manifest futility of giving *John* the surrenderee an estate tail, and afterwards a fee in succession. Though if the construction had been left doubtful, the ultimate remainder would have continued in the surrenderor.

THIS was an ejectment for a copyhold in the county of *Lincoln*; and the declaration consisted of four counts, one upon the joint demise of all the lessors of the plaintiff, and the others upon the several demises of *Joseph Hucknall*, *Ann Lealand*, and *Sarah Lealand*. A verdict was taken for the plaintiff, subject to the opinion of the Court upon the facts.

The premises in question are copyhold of the manor of *Scotter*; of which premises, *John Lealand*, being seised in fee, on the 3d *September* 1682, made the following surrender. "*Man. de Scotter*, &c." (after setting out the stile of the Court held on the 3d of *October* 1682), ad hanc curiam præsentatum est per *R. B.* et *T. S.* duos customarios tenentes domini manerii prædicti, super sacra, quod *Johannes Lealand* extra curiam, scilt. tertio die *Septembris* ult: præterit: venit coram eisdem *R. B.* et *T. S.* &c. ac per eorum manus sursum reddedit in manus domini manerii prædicti, secundum consuetudinem ejusdem manerii, unum messuagium, &c. (describing the premises) in *Scotter* prædictâ, in tenurâ prædicti *Johannis Lealand*, ad opus et usum *Josephi Lealand* et *Johannis Lealand ejus filii* pro et durante termino vitarum suarum naturalium, et eorum diutius viventis; et post eorum decessus, ad usum hæredum de corpore dicti *Johannis Lealand, filii Josephi Lealand* in perpetuum; et pro defectione talium existentium ad usum rectorum hæredum *dicti Johannis Lealand* in perpetuum: quibus quidem *Josepho* et *Johanni* dominus

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dominus manerii prædicti per Senesc: suum ibidem concessit, &c."

Joseph Lealand and *John Lealand* the surrenderees are both dead without issue; *John* having done no act to bar the estate tail. The lessors of the plaintiff, *Mary Hucknall*, *Ann Lealand*, and *Sarah Lealand*, are the right heirs of *John Leland* the surrenderor, and have been duly admitted to the premises in question. The defendant is the tenant in possession under the right heirs of *John Lealand* the surrenderee. The question for the opinion of the Court arose upon the construction of the said surrender; namely, Whether the remainder in fee, after the determination of the estate tail of *John Lealand* the surrenderee, descended to the right heirs of *John Lealand* the surrenderor, or to the right heirs of *John Lealand* the surrenderee: if to the former, the verdict for the plaintiff was to stand: if to the latter, the verdict was to be entered for the defendant.

Reader for the plaintiff contended that the remainder in fee, after the death of *John Lealand* the surrenderee, was limited to the right heirs of *John Lealand* the surrenderor. The names of the two *John Lealands* occur twice before the ultimate limitation "to the right heirs of *the said John Lealand*;" and on both occasions the name of *John Lealand* the surrenderor is mentioned, as in the ultimate limitation, without any further addition: whereas *John Lealand* the surrenderee is both times named with the addition of *filius Josephi Lealand*; and when he is afterwards mentioned without the addition, he is still coupled with his father, as the surrenderees; in

in which place there could be no difficulty as to the person meant. 1808.

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Morice, contrà, relied on the word *said* (to the use of the right heirs of the *said John Lealand*) as referring in grammatical construction to the *John Lealand* last before named, which was *John Lealand* the surrenderee: and cited *Weale* v. *Lower* (*a*): but finding the Court decidedly against him on the construction of the surrender, he did not urge the argument further.

Lord ELLENBOROUGH C. J. It would be sufficient for the lessor's counsel to shew that it was quite uncertain on the face of the surrender to which of the *John Lealand's* right heirs the estate was ultimately to pass: for unless it were shewn distinctly to pass out of the surrenderor, it would necessarily remain in him. But there is no uncertainty in the words; for the name of *John Lealand* the surrenderee no where occurs before without the additional description of him as the son of *Joseph*. Besides which the sense of the thing shews that the ultimate limitation was to the right heirs of *John Lealand* the surrenderor; for otherwise, there would be a useless circuity of expression, by the construction contended for by the defendant, in first giving *John Lealand* the surrenderee an estate tail, and then immediately afterwards a fee; when it would have been more direct and obvious to have given him the fee at once, if that had been intended. But if the surrenderor meant to give it to his own right heirs, then the words used are proper.

(*a*) *Pollex.* 63.

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The other judges concurred; and LE BLANC J. added, that *John Lealand*, the furrenderee, was defcribed as plainly as if he had had a diftinct name from the furrenderor, being defcribed as the fon of *Jofeph*.

Poftea to the plaintiff.

PAXTON and Others *againft* Sir HOME POPHAM and MAC ARTHUR.

Tuefday, May 17th.

To debt on bond conditioned for the payment of a fum of money, which the condition ftated to have been *taken up, borrowed, and received* by the defendants of the plaintiffs at refpondentia intereft, fecured by a cargo of goods fhipped from *Calcutta* to *Oftend*; it is competent to the defendant to plead that the bond was given to fecure the price of goods fold by the plaintiffs to the defendants in the *Eaft Indies*, and illegally prepared by the plaintiffs for fhipment from thence to beyond the *Cape of Good Hope*, without the licence of the *Eaft India* Company; without proceeding to ftate formally, that the condition was colourable, to conceal the illegality of the tranfaction, and to negative that the bond was given for money *taken up, borrowed, and received*, &c. For the ftatement in the plea is rather explanatory of, than abfolutely inconfiftent with, the tranfaction ftated in the condition of the bond; but if it were inconfiftent with it, the plea would ftill be good in this form.

THE plaintiffs declared in debt, in their firft count, upon a bond executed by the defendants (therein defcribed to be then of *Calcutta*, and the defendant Sir *H. P.* alfo defcribed to be part owner of the fhip and cargo of the *Stadt Van Weenen*,) dated the 1ft of *January* 1789, at *Calcutta*, whereby they bound themfelves to the plaintiffs, defcribed as of *London*, in the penal fum of 6500*l.* with this agreement and condition: that whereas the defendant had *taken up borrowed and received* of the plaintiffs the full and juft fum of 3250*l.* which was to run at refpondentia on the fhip *Stadt Van Weenen* from *Calcutta* to *Oftend*, &c. at the rate of 10*l.* per cent. premium for the voyage, if performed in nine months; in confideration of which the ufual rifks of the feas, &c. to be on account of the plaintiffs: and for the *farther fecurity* of the plaintiffs, the defendants had agreed to mortgage and affign over to them the feveral goods laden or to be laden on the fhip during the voyage, until payment of the principal and premium of that bond: the condition of the bond was

that

that if the defendants ſhould pay to the plaintiffs the full amount of the bond and premium in *London* at the end of nine months after the ſafe arrival of the ſhip at *Oſtend*, or, in caſe ſhe was loſt, the cuſtomary average on the ſalvage, then the bond was to be void. The plaintiffs then averred that the ſhip afterwards ſailed with a cargo of goods from *Calcutta* to *Oſtend*, and on the 25th of *Auguſt* 1789, within the nine months, arrived at *Oſtend*, whereby the defendants became liable to pay in *London*, at the end of nine months after ſuch her arrival, the full amount of the bond and premium amounting to 3575*l.*: and then alleged a breach in nonpayment of that ſum on demand. The ſecond count was on a bond of the defendant's, dated at *London* on the 23d of *March* 1790, (deſcribing the defendant *Popham* as of *Oſtend*, and the other defendant as late of *Oſtend*, then of *London*; and deſcribing the plaintiffs as merchants of *London*;) with this condition; reciting that the defendants had given, at *Calcutta* on the 1ſt of *January* 1789, ſundry bills and a reſpondentia bond in favour of the plaintiffs, of which there remained unpaid a bill of Exchange drawn by *Mac-Arthur* on *Marſh* and *Creed* of *London* (not accepted) for 1041*l.* 13*s.* 4*d.* and the reſpondentia bond (mentioned in the firſt count) for 3250*l.* and the premium, &c.; and that the defendants, deſirous of making good thoſe engagements, had taken ſteps for conveying the property of ſuch part of 44 bales of piece goods then in poſſeſſion of *Gregorie and Co.* of *Oſtend*, as had not been paid to the defendants, excluſive of 3000*l.* previouſly aſſigned to *Charnock and Co.* of *Oſtend*; ſo that the plaintiffs might receive remittances from *Gregorie and Co.* for the ſaid goods, deducting the 3000*l.* and 800*l.* already paid to the defendant *Mac-Arthur*; but that being well aware that the ſaid proceeds would not in all probability be adequate to the full diſ-

 charge

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charge of the faid unaccepted bill and the refpondentia bond; the defendants thereby covenanted jointly and feverally to pay all deficiencies that might be found in realizing the remittances fo directed to be made to the plaintiffs: this bond was therefore conditioned to make good fuch deficiencies. The plaintiffs then averred that on the 29th of *January* 1792 they received from *Gregorie and Co.* on account of the faid goods a remittance of 2000*l.* which was inadequate by 4021*l.* 13*s.* to the full difcharge of the faid unaccepted bill and refpondentia bond; whereby the defendants became bound to make good the deficiency: and fo alleged a breach in nonpayment of the laft mentioned fum. There was a third fpecial count, and other common counts, not material to be ftated. The defendants pleaded non eft factum to each of the three fpecial counts, and nil debent to the reft. 3dly, That the writings obligatory in the fecond and third counts are the fame, and that *Gregorie and Co.* made remittances to the plaintiffs on account of the proceeds of the goods there mentioned, to the amount of all the monies due. 4thly, As to the firft, fecond, and third counts, that the writing obligatory in the firft count mentioned, and the refpondentia bond in the conditions of the writing obligatory in the fecond and third counts mentioned are the fame; and that the plaintiffs and defendants before and at the time of the fale of the goods after mentioned were fubjects of the King; and that before the making of the faid writing obligatory, viz. on the 1ft of *December* 1788, it was unlawfully agreed between the defendants and the houfe of *Paxton and Co.* of which firm one of the prefent plaintiffs was one, that *Paxton and Co.* fhould illegally, and againft the ftatute, and without the licence or authority of the *Eaft India* Company, fell to the defendants, and

and deliver in the *East Indies* beyond the *Cape* of *Good Hope*, divers goods for the purpose and to the intent that the said goods might illegally and without such licence be conveyed from the *East Indies* for the purposes of trade: and that *Paxton and Co.* in pursuance of that agreement afterwards sold and delivered the said goods accordingly; they well knowing for what purpose and with what intent the goods had been bought: and that they assisted the defendants in preparing the goods for carriage upon such illegal design and purpose. That the bond in the first count, and the bill of Exchange in the condition of the writing obligatory in the second and third counts mentioned, were given towards payment of the price of such goods. There were other special pleas in substance the same as the last. To the fourth and subsequent pleas the plaintiffs demurred generally, and issues were taken on the others.

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Burrough in support of the demurrers, admitting the agreement stated in the defendant's pleas to be unlawful, according to the case of *Camden* v. *Anderson* (a), insisted that there was a material distinction between the first count, and the second and third; (the two last being substantially the same.) The first count is on a bond merely for securing the payment of money borrowed: the second and third counts are on a bond given to forward the payment of a bill of Exchange as well as the bond in the first count: supposing then the fourth and subsequent pleas to be tenable as to the bill of Exchange; though this would be an answer to the second count, if properly pleaded; yet if bad as to the first, the pleas, being entire,

(a) 6 *Term Rep.* 723. and 1 *Bos.* & *Pull.* 272.

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are bad as to the whole. Then taking the pleas as applicable to the firſt count, the bond there ſtated is a common reſpondentia bond: the pleas do not ſtate it to have been colourably given; nor do they allege that the defendants were not indebted to the plaintiffs for the money lent; which muſt therefore be taken as admitted. But if a matter inconſiſtent with the condition of a bond be pleaded, the plea muſt ſhew the ſtatement in the condition to be merely colourable: the rule of pleading being that the party muſt confeſs and avoid: and not being ſo ſtated, the plea is inconſiſtent with the charge in the count, founded upon the admiſſion of the party under ſeal; which is not allowable. The condition of the bond ſtates that 3250*l.* was taken up by the defendants of the plaintiffs to run at reſpondentia intereſt. The pleas ſtate that the plaintiffs ſold goods to the defendants in the *Eaſt Indies* for the purpoſe of trading with them to *Europe*, without the licence of the *Eaſt India* Company, and that the plaintiffs aſſiſted in preparing the goods for carriage, and that the bond in the firſt count and bill of Exchange in the ſecond and third counts were given towards payment of the price. But it is not alleged in the pleas that the goods ſo ſold were the goods put on board the ſhip; nor is the bond ſtated to be in any other way connected with the goods ſold by the plaintiffs to the defendants than by the averment that it was given *in diſcharge of the price of thoſe goods*. The averment then in thoſe pleas is inconſiſtent with the ſtatement of the bond in the firſt count, " that the defendants had *taken up, borrowed, and received* of the plaintiffs the *full and juſt ſum of* 3250*l.*, for which the bond was given, and which is left admitted by the pleas. In *Macrowe*'s caſe (*a*) the condition of the bond

(*a*) *Godb.* 29.

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bond declared on expreffed it to be made for repayment of money, and the Court gave judgment againft the defendant, on a plea averring that it was made to fecure the leafe of an ecclefiaftical living, avoided by the ftat. 13 *Eliz.* agreeably to the rule laid down in *Oldbury* v. *Gregory* (*a*), (which was debt on bond conditioned for the payment of money,) that it is not averrable that the money was to be paid for any other caufe than what the obligation expreffes. Admitting, however, that fince the cafe of *Collins* v. *Blantern* (*b*) this matter might have been well pleaded by proper averments; yet where the matter in the plea is directly inconfiftent with the matter in the bond and condition, it is not fufficient fo to plead it, without averring that what is ftated in the bond and condition was merely colourable, and traverfing the allegations therein contained; as was done in the laft mentioned cafe. That was debt on bond conditioned to pay 350*l.* to the plaintiff on a certain day: to which the defendant pleaded, that before making the bond and the note after mentioned two of the obligors ftood indicted for perjury, and on the day when the traverfes were ready for trial it was corruptly agreed between them, and the plaintiff, and the profecutor, that the plaintiff fhould give the profecutor his note for 350*l.* in confideration of his not appearing to give evidence againft the traverfers, and that the latter fhould give the bond in queftion to the plaintiff to indemnify him for giving fuch note. And then the plea proceeded to aver that the bond was given for the faid confideration and no other; which the plaintiff well knew; and denied that the obligors were indebted to the plaintiff at the time in any fum of money or in any other refpect whatfoever. To which plea there

(*a*) *Moor*, 564. (*b*) 2 *Wilf.* 347.

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was a demurrer: and on the fourth point there made, whether the plea were properly pleaded in point of form, Lord C. J *Wilmot* in delivering the judgment of the Court said, that the averment pleaded was *not contradictory but explanatory of the condition*: and it was said to be distinguishable from the case of *Lady Downing* v. *Chapman* (*a*), which had been cited, as of *M.* 6 *G.* 2. where three of the Judges had decided against a plea of this nature, because they thought it inconsistent with the bond. In *Collins* v. *Blantern*,

(*a*) The case is not reported, but Mr *Burrough* stated the plea from Mr. Serjeant *Jephson*'s brief.

Lady DOWNING, Executrix of Sir JACOB GERRARD DOWNING, Baronet, *against* CHAPMAN.

To debt on bond dated 6th *September* 1754 for 2678*l.* the defendant craved oyer of the bond and condition; which reciting that the defendant had theretofore become bound to Sir *Jacob* in 2200*l.* by a bond dated 6th *June* 1750, conditioned to pay 1104*l.* 9*s* 3*d.* and interest on the 6th of *December* then next, which he had not done; and that upon an account stated there appeared to be owing from the defendant to Sir *Jacob* for principal and interest 1339*l.* 1*s.* 3*d.*: the bond now in suit was conditioned to pay the last mentioned sum and interest: and then the defendant pleaded, 1. Non est factum. 2dly, That *Dunwich* in *Suffolk* is an ancient borough, having an indefinite number of freemen, and sending two burgesses to parliament; and that the freemen inhabiting within the borough, and not receiving alms, had the right of voting in the election of burgesses. That before and at the time of making the bond Sir *Jacob* pretended a right to and had assumed the government and direction of the affairs and concerns of the borough, and had declared and caused it to be propagated there, that such persons only as he should approve of should represent the borough in parliament: and that the defendant then was and yet is a freeman of the borough, inhabiting there, and not receiving alms, and by reason thereof had and yet has a right to vote in the election of burgesses: and that the defendant was also at the time of making the bond indebted to Sir *Jacob* in 100*l.*; and that having such

Blantern, the plea, as the Court observed, did not contradict the bond, but only shewed how the obligation arose. So

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such right to vote, and being so indebted, on the 15th of *July* 1751, before the making of the bond, it was unlawfully agreed between him and Sir *Jacob*, that Sir *Jacob* should not demand the said debt of the defendant, and that in consideration thereof the defendant at all times afterwards should give his vote in the elections of burgesses of the borough for such persons as Sir *Jacob* should from time to time approve of, and none else, and should also serve the other purposes of Sir *Jacob* in the borough; and that for securing these purposes the defendant should give his bond to Sir *Jacob* in the penal sum of 2678*l.* *with a colourable condition* thereunder written for the payment of 1339*l.* 1*s.* 3*d.* with interest; but that Sir *Jacob* should not demand the same of the defendant so long as he continued to vote for such persons to be elected burgesses, &c. as Sir *Jacob* should from time to time approve, and none else, and serve the other purposes of Sir *Jacob* in the borough. And then the defendant pleaded that in pursuance of that agreement the bond in question was given, and was therefore void in law. The plaintiff by her replication, protesting that the plea was insufficient in law, admitted the constitution of the borough as stated; and that the defendant before and at the time of giving the bond was and yet is a freeman, &c. having a right to vote in the election of burgesses; but protesting that Sir *Jacob* never pretended to or assumed any such right to the government and direction of the affairs or concerns of the borough, nor propagated any such notion as in the plea stated; and protesting also that the defendant before and at the time of making the said bond was indebted to Sir *Jacob* in more than 100*l.*; and also protesting that no such agreement as mentioned was made between Sir *Jacob* and the defendant, and that the bond was not given on any such consideration; replied that the defendant before and at the time of making the bond *was justly and truly indebted to Sir* Jacob *in the said sum of* 1339*l.* 1*s.* 3*d.* in the condition mentioned, and that for securing payment thereof the bond in question was given. To this the defendant demurred, and stated for special causes, that the plaintiff had in her replication alleged that the sum mentioned in the condition of the bond was due from the defendant to Sir *Jacob*, and that the bond was given for securing the repayment thereof; which was a different consideration from that stated by the defendant in his plea; and yet the plaintiff had not traversed the consideration for giving the bond insisted on by the defendant: that the

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So in *Pole* v. *Harrobin* (a), the plea was not inconsistent with the condition of the bond; the bond being conditioned to pay 50*l.* in case the defendant did not procure *J. H.*

replication attempted to draw in question a matter immaterial and inconclusive, and contained no matter on which a pertinent and decisive issue could be taken, but was merely argumentative, &c.

(a) *E.* 22 *G.* 3. *B. R.* The following note of the case is taken from a MS. book in the hand-writing of the late Mr. *Durnford*, though probably copied by him from the note book of another gentleman then at the bar.

POLE *against* HARROBIN, *E.* 22 *G.* 3. *B. R.*

An officer cannot commute for money the services of an impressed man, nor let him go for money: and a bond given to secure the man's return on non-payment of such money is void, and may be avoided by plea disclosing the true transaction, and shewing that the man was illegally impressed.

DEBT on bond for 100*l.* the defendant, after craving oyer of the bond and condition; which last was for payment of 50*l.* "in case I do not procure *J. H. Cooper*, now *impressed*, &c. to appear and deliver himself to the plaintiff whenever he shall be called upon;" pleaded, 2dly, that *J. H. Cooper* was not liable to be impressed by any law, &c., and having been *unlawfully impressed*, the plaintiff was unwilling to discharge him unless he would agree to pay, &c. and would procure the defendant to become bound: and that it was unlawfully agreed that the plaintiff should discharge *J. H. C.* and that *J. H. C.* should pay, &c. as a gratuity and reward, &c.: that the defendant at the request of the said *J. H. C.* did become bound for securing the payment, &c. corruptly and unlawfully demanded, &c.; by virtue of which said several premises, the said writing obligatory, so made as aforesaid, was and is void in law, &c. To this there was a general demurrer. [And there were also questions on other parts of the pleadings not material to the present purpose.]

Wood for the plaintiff, on the demurrer to the second plea. The defendant cannot aver what is inconsistent with the condition of the bond. *Jenk.* 166. *Carth.* 370, *Chapman* v. *Downing* C. B., *Mich.* 6 *G.* 2. This last was debt on bond for the payment of money: the defendant pleaded, that it was agreed he should not be called upon unless he should act contrary to Sir *Jacob Downing's* directions in voting. Three justices were of opinion against the plea. *Collins* v. *Blantern*, 2 *Wils.* 347. does not impeach *Chapman* v. *Downing*. [*Wallace*, amicus curiæ, said, that the proceedings in *Chapman*

J. H. C. then impreffed, &c. to appear and deliver himfelf to the plaintiff when called upon; and the plea being that *J. H. C.* having been *unlawfully* impreffed, the plaintiff

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man v. *Downing* were ftayed on the authority of the judgment in *Collins* v. *Blantern*.] The defendant is eftopped from controverting a fact admitted on the deed. *Moor*, 420. *Codb.* 177. *Noy.* 79. *All* 52. *Sho.* 59. *Stra.* 512. It appears that the party was impreffed; which means, *legally*, ex vi termini. And as to the defendant it is totally immaterial; for if it be otherwife, there is a proper mode to obtain the party's difcharge: and the defendant who is a third perfon cannot urge the contrary, and aver contrary to the condition.

Law, contrà. Durefs of the principal is no plea for a furety in an obligation; as appears from *Cro Jac.* 187: but the matter alleged goes to deftroy the inftrument itfelf; being either an illegal contract, or a reward for remitting an unlawful reftraint. *Collins* v. *Blantern* is decifive. *Impreffing* means merely [illegible], and we may fhew this illegal contract, which is paramount the condition.

Lord MANSFIELD C. J. The fecond plea is of general confequence: it is objected to, becaufe it is averring contrary to the condition in the bond; and on this point there is fome perplexity in the cafes; but there cannot exift fuch an abfurdity as that a man fhall have a good defence to an action, and not be able to fhew or take advantage of it either by pleading or in evidence. Whatever is a defence in law, or ground for relief in equity againft a deed, may be pleaded, and is confiftent with the inftrument. The language is, I did give the inftrument, but under fuch circumftances as make it void. This does not apply to voluntary bonds. The foundation is that you fhall not by parol impeach a written agreement, and fay that the agreement was different: but the agreement being admitted, the party may come and fhew circumftances to vitiate the whole proceeding. It was fo determined in *Collins* v. *Blantern*, to avoid the deed. Here the party fays I was illegally impreffed (i. e. de facto impreffed), and entered into the bond to avoid being imprifoned. On the face of the bond itfelf this almoft feems to be illegal. What authority can an officer have to let an impreffed man go, or to commute his fervices? How can he know whether the fervices will be wanted? It is like a fheriff letting a prifoner go. The demurrer admits the fecond plea to be true, and it is a good plea.

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plaintiff was unwilling to difcharge him, unlefs he would agree to pay 50*l.* and would procure the defendant to become bound: and thereupon it was unlawfully agreed that the plaintiff fhould difcharge *J. H. C.* on the defendant's becoming bound for the payment of that fum. The condition of the bond there only ftated that the man was *impreffed;* whether lawfully or not did not appear: and the plea in ftating that he was *unlawfully* impreffed did not contradict but explain the condition. The authority of *Downing* v. *Chapman* was left untouched. Here the pleas ftate a tranfaction independent of that ftated in the condition of the bond, and there is a bare averment that the bond and bill were given for an unlawful confideration arifing out of fuch foreign tranfaction, inconfiftent with that ftated in the condition of the bond: the one ftating the confideration to have been *money borrowed and received by the defendants of the plaintiffs;* the other ftating it to be for the price of goods illegally agreed to be fmuggled from our *Eaft India* fettlements into *Europe.*

Holroyd, contrà, denied that the confideration for the bond as ftated in the plea was inconfiftent with that ftated in the condition: but if it were, he ftill contended the bond would be void, if it appeared to have been given for

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Wood moved to amend by replying and denying the fact.

BULLER J. This is not a cafe where the Court ought to affift you. The doctrine in *Downing* v. *Chapman* was that you cannot aver a different condition, but may ftate a confideration confiftent with the condition, which confideration is illegal and may prove the inftrument void.

Judgment for the defendant.

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any illegal confideration. The condition of the bond ftates that the defendants had borrowed of the plaintiffs fo much. The plea ftates that it was illegally agreed between them, that the plaintiffs fhould fell goods to the defendants to be carried from the *Eaft Indies* to *Europe* illegally, and that the bond was given to recover the price of thofe goods. Now goods agreed to be taken as money may be declared for as money; according to *Barbe* v. *Parker* (*a*). But fince the cafe of *Collins* v. *Blantern* (*b*), it has been always confidered, that whatever the confideration ftated in the bond might be, it was competent to the defendant to aver the true confideration, however inconfiftent with that ftated: and indeed unlefs this were fo, no bond could ever be avoided for an illegal confideration, as the obligee would always take care to ftate upon the face of it a confideration legal in itfelf, but as inconfiftent as poffible with the true one. This is done every day in cafes of ufury, gaming, and ftock-jobbing: yet the true confideration is always admitted to be ftated. [*Le Blanc* J. This has frequently occurred in cafes of annuity tranfactions, where, as in cafes of ufury, goods have been given to the obligors inftead of money, as ftated in the condition of the bonds.] In *Hayne* v. *Maltby* (*c*) the defendant, having covenanted with the plaintiff to ufe his patent machine and no other, was held not to be eftopped from pleading in bar, to an action on the covenant, matter which avoided the patent. And in *Lightfoot* v. *Tenant* (*d*), which was debt on bond conditioned for the payment of money, the fourth and fixth pleas were in the fame form as thefe in queftion,

(*a*) 1 *H. Black.* 283. and vide *Hands* v. *Burton*, *ante*, 349.
(*b*) 2 *Wilf.* 347.
(*c*) 3 *Term Rep.* 438.
(*d*) 1 *Bof. and Pull.* 551.

and

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and ſtated that the bond was given to ſecure payment of the price of goods unlawfully agreed to be ſold and delivered in *London* by the plaintiff to the defendant, to be by the latter ſhipped to *Oſtend*, and from thence reſhipped for the *Eaſt Indies*, and there trafficked with clandeſtinely; which was held to be a good bar to the action.

Burrough, in reply, ſaid that there was no queſtion in the laſt caſe as to any inconſiſtency between the matter pleaded and the condition of the bond. And as to the caſes of uſury, &c. where goods had been agreed to be taken as money, and the ſecurity ſtated the agreed value as ſo much money; it might have been taken to be ſo as againſt the party contracting on that baſis; and then the queſtion of inconſiſtency between the conſideration ſtated in the bond and that ſtated in the plea would be avoided. The caſe of the patent turned on the original avoidance of it by force of the ſtat. 21 *Jac.* 1. *c.* 3. becauſe it was not a new invention: as infancy or coverture may be pleaded in bar of an action on a bond, becauſe they evince the incapacity of making the deed.

Lord ELLENBOROUGH C. J. At preſent I cannot entertain a doubt upon the point: but if on further conſideration any doubt ſhould occur to myſelf or my brothers, we will mention it; and the rule for the judgment which we ſhall now pronounce need not be drawn up till the end of the term. I own I do not feel that palpable inconſiſtency which has been ſo much relied on in argument between the conſideration ſtated in the plea and that ſtated in the condition of the bonds. The condition of the firſt bond ſtates that the defendants took up ſo much money

of the plaintiffs which was to run at refpondentia intereft on the fecurity of certain goods fhipped from *Calcutta* to *Oftend*: the fecond count is upon a bond conditioned to fecure the payment of certain bills of Exchange and the money remaining due on the refpondentia bond before mentioned. The pleas ftate that the bill and refpondentia bond were given to cover the price of goods fold by the plaintiffs to the defendants for the purpofe of an illegal traffic from the *Eaft Indies*, and that the plaintiffs knowingly affifted in preparing the goods for carriage upon fuch illegal voyage. Now upon the adjuftment of the account after the goods were fold, the parties might have calculated upon the debt as upon a loan to that amount: and therefore there is no neceffary inconfiftency between the two ftatements; even taking the cafe upon the ftrict rule of law, as it had been generally confidered before the cafe of *Collins* v. *Blantern*. But fince that cafe, to the principle of which I more readily accede than to what was laid down in *Downing* v. *Chapman*, which was always much queftioned; there can be no doubt upon the fubject. According to the doctrine of the Chief Juftice in *Collins* v. *Blantern*, unlefs the obligor were permitted to contravene the condition of the bond by plea fhewing the truth of the tranfaction, a bond would be made a cover for every fpecies of wickednefs and illegality. It would only be neceffary to have a bond with a condition ftating the confideration of it as widely different from the truth as poffible. That cafe which was decided in 1767 runs on all fours with the prefent, except that the condition there was general for the payment of money. And fince the cafe of *Pole* v. *Harrobin* in 1782, it has been generally underftood that an obligor is not tied up from pleading any matter which fhews that the bond was given

given upon an illegal consideration, whether consistent or not with the condition of the bond. At present I see no such inconsistency: but if I did, I should still be prepared to abide by the principle of *Collins* v. *Blantern*, that the defendant might by his plea introduce a statement of facts inconsistent with what appears upon the condition of the bond, in order to shew its illegality.

GROSE J. One question made is whether the matter set forth in the defendant's plea has been well pleaded; and it is contended not to be so, because it is inconsistent with what appears on the condition of the bond, and that the matter as stated in the condition is not averred to be colourable, nor distinctly traversed. I am rather inclined to think however that there is no absolute inconsistency between them, but that taking the whole transaction together as disclosed by the condition of the bond and in the pleas, the one may be taken in explanation of the other. And it would tend greatly to defeat the justice of the case if this mode of pleading were not allowed. The only question then is whether the matter so pleaded shews the consideration of the bond to have been illegal and void. Now the plea discloses an illegal agreement between the parties against the rights of the *East India* Company, and that the bonds in question were given in furtherance of that illegal agreement; being given to cover the price of goods sold and shipped for the purpose of eluding the Company's charter. This is not incompatible with what is stated in the condition of the bond: but if it were, how can a transaction of this sort be got at but by stating the true facts? If the obligor were concluded by a colourable transaction stated in the bond, it would be a recipe for getting rid of any objection to it

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it however illegal the consideration may have been. I think therefore the rule in *Collins* v. *Blantern* was wisely introduced, and has been wisely assented to from that time, that wherever the consideration of a bond was illegal, the defendant may shew that by his plea.

LE BLANC J. It is admitted that the transaction disclosed by the plea is illegal, namely, the sale by the plaintiffs to the defendants of goods in *India* to be conveyed from thence to *Europe*, without the license of the *East India* Company; and the plaintiffs having aided the defendants in preparing the goods for shipment for that purpose: for the price of which goods the securities in question were given. The only objection made is to the form of the pleas: and it is said that because the bond is not conditioned simply for the payment of money, but is stated to be given for money taken up and borrowed upon respondentia, that is inconsistent with the statement in the plea that it was given to cover the price of goods sold and delivered for the illegal purpose mentioned: and that therefore the plea ought to have gone on and negatived that the bond was given for money so taken up and borrowed, and to have shewn that the transaction was colourably stated in the condition. But after the cases, breaking in upon the old rule, have determined that though the bond state nothing illegal upon the face of it, the obligor may shew by his plea that it was given for an illegal consideration, they have in effect decided that he may shew an illegal consideration different from the consideration stated in the condition of the bond. And when the plea states that the bond was given to cover the price of goods illegally contracted to be sold and shipped, it does in effect deny that it was

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given for money borrowed: and it shews that the statement of the transaction in the condition was made colourably in order to cover the illegal agreement.

BAYLEY J. said, that having advised on these pleadings when at the bar, he should not give any opinion upon case.

Judgment for the defendants.

STOKES *against* MASON.

Tuesday, May 17th.

An attorney of B. R., in pleading his privilege against being sued by original, improperly stated the custom of this Court to be not to compel its attornies to answer an original writ, *unless first forejudged from their office, &c.* (which is the custom in C. B. but not in this Court:) but held that enough appearing to sustain the plea, the custom which had no foundation here, might be rejected as surplusage.

THE plaintiff sued the defendant as a common person by original, and declared upon a bill of Exchange accepted by the defendant and afterwards indorsed to the plaintiff. The defendant pleaded in abatement, that he ought not to be compelled to answer the said original writ, because he is and was on the day, &c. an attorney of *B. R.*; and that in the same Court there now is and from time immemorial hath been a custom that no attorney of the said Court hath against his will been compelled to answer any person in any personal action prosecuted here by original writ sued out, which hath not concerned the king, unless he hath been first *forejudged* from his office of an attorney of this Court, upon a bill exhibited here to the justices of our Lord the king before the king himself, against such attorney, and filed in the same Court. And then the defendant averred that he hath not been forejudged from his office, &c. and that he is impleaded by the original writ aforesaid against his will, and against the custom aforesaid: and this he is ready to verify; wherefore

wherefore as the defendant is and was on the day, &c. an attorney of the ſaid court, &c. he prays his privilege aforeſaid to be allowed and adjudged him, &c. To this the plaintiff demurred ſpecially, becauſe the defendant by his plea had alleged an immemorial cuſtom in this court, that no attorney of the court had againſt his will been ſued by original in any perſonal action, &c. unleſs he had been firſt *forejudged from his office, &c.*: whereas an attorney of this court was not by the practice of the court in that behalf to be *forejudged from his office of an attorney* of this court in manner and form as the defendant had alleged: and whereas the defendant ſhould have pleaded that he ought not contrary to his will to be compelled to anſwer in any manner whatever *except by bill* to be exhibited againſt him as an attorney of this court.

Beſt, in ſupport of the demurrer, ſaid that the defendant, meaning to avail himſelf of his plea of privilege as an attorney of this court, had improperly pleaded it in the form of an attorney of *C. B.*: and this being ſhewn as ſpecial cauſe of demurrer, the Court will not reject it as ſurpluſage (*a*). Pleas in abatement are always conſtrued ſtrictly (*b*); and ſhould ſtate a better proceſs. But ſtating a cuſtom here of forejudging attornies of their privilege is only calculated to miſlead.

Walton, contrà, obſerved that what was unneceſſarily ſtated, in reſpect to the cuſtom of an attorney of *B. R.* being forejudged of his office, went to narrow and not to extend his privilege, and might well be rejected as inſenſible and ſurpluſage; there being no ſuch cuſtom known in *B. R.* But as an attorney of this court was not ſuable at all except by

(*a*) *Barlow* v. *Evans.* 1 *Wilſ.* 99. (*b*) *Roberts* v. *Moor*, 5 *Term Rep.* 483.

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bill; and here the defendant was sued by original; enough appeared, without the surplus matter, to shew that the defendant was entitled to his privilege.

Lord ELLENBOROUGH C. J. Admitting the general pinciple, that a plea in abatement to the writ must give the plaintiff a better process, it is sufficient for the defendant to plead that he is an attorney of this court, and as such to claim his privilege not to be sued by original: for we will take notice that an attorney of this court can only be sued by bill. It is true the plea goes on to state something about a custom in this court of forejudging an attorney of his privilege; of which we know nothing: but enough being shewn to support the plea, that which is here added unnecessarily will not vitiate it; as in *Hopkins* v. *Squibb*, 1 *Ld. Ray.* 702. And in *Routh et Uxor* v. *Weddell*, 2 *Lutw.* 1666. where exception was taken to a plea of privilege by an attorney of *C. B.* that the custom was not stated with sufficient precision, the Court said they would take cognizance of the privileges of the attornies of the court, and therefore the custom need not be so precisely alleged as other customs.

Per Curiam, Judgment for the Defendant.

Tuesday, May 17th.

HUSSEY *against* CHRISTIE and Others.

The master of a ship has no lien on it for money expended or debts incurred by him for repairs done to it on the voyage.

THE Lord Chancellor sent the following case for the opinion of this Court.

On the 28th of *July* 1804 *John Hill*, the owner of the ship *Britannia*, engaged by a written contract the plaintiff *Hussey* as master of her, on a voyage to the *South Sea* fishery. [The case set forth the contract, but nothing

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thing turned upon the particular provisions of it. Amongst other things it stated that *Hill* agreed to allow to *Hussey* for his own services and also for providing officers and crew for the voyage one-third of the neat proceeds of the adventure and that *Hussey* should discharge all the lawful demands which the said officers and men might have on the ship and cargo.] The ship being equipped and provided for the voyage, the plaintiff took the command as master, and sailed from *England* in *September* 1804 upon the voyage agreed upon, and prosecuted the same with all due diligence; and, having procured a considerable cargo arrived with the ship at *Port Jackson* in *South Wales* in *June* 1806; but in consequence of her having met with very severe weather and sustained much damage it became impossible to prosecute the voyage further, without considerable repairs at *Port Jackson*. The plaintiff accordingly caused the necessary repairs to be done, and the articles of tackling and furniture wanting to be supplied, and expended a large sum of money for those purposes. But not being able to advance all the money necessary to complete the repairs, he drew several bills of exchange upon *Hill* the owner, for the purpose of raising money to supply the deficiency. Having completed the repairs necessary for bringing the ship and cargo home, the plaintiff set sail from *Port Jackson* for *England*; but in the course of the voyage it became necessary to make further repairs and to procure a new cable; for all which the plaintiff was obliged to draw other bills of exchange on the owner, and also to give his own promissory note. The plaintiff arrived with the ship and cargo in *London* on the 15th of *April* 1807. During his absence on the voyage *Hill* the owner became a bankrupt, and a commission was duly issued against

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him, and some of the defendants were chosen his assignees. None of the bills of exchange mentioned have been paid by *Hill* or his assignees; and some of them have been taken up by the plaintiff, as the drawer, since his return with the ship. Nor has any part of the money expended by the plaintiff in the repairs of the ship and in providing the necessary tackling and furniture been repaid to him. The plaintiff intended and endeavoured to retain the ship in his possession until he had been reimbursed the money expended, and indemnified against the debts incurred by him as aforesaid; but *Hill's* assignees and the other defendants (who claim an interest in the ship or cargo,) or some of them, forcibly took possession of the ship and brought her into the *London* dock. Whereupon the plaintiff filed his bill in Chancery, amongst other things, for an injunction to restrain the defendants from disposing of the ship and cargo until his claim should be first satisfied: and the defendants having put in their answer, the Lord Chancellor directed this case to be stated for the opinion of this Court upon the following question: Whether the plaintiff had any lien on the ship for the money expended or debts incurred by him for the repairs done to her on the voyage?

Scarlett, for the plaintiff, admitting that he had not found any adjudged case at law upon the point, said that it was taken for granted in many cases that the master had a lien upon the ship for the amount of the necessary repairs of it paid or contracted for by him abroad, though not for repairs done in *England*: and he instanced *Wilkins* v. *Carmichael* (*a*), *Watkinson* v. *Barnardiston* (*b*), and *Ex parte Shank and Others* (*c*). All

(*a*) *Dougl.* 101. (*b*) 2 *Pr. Wms.* 367. In this case the Master of the Rolls, as it appears by Mr. *Cox's* note from the registrar's book, held that the money paid to tradesmen for repairs, &c. by the Captain abroad was not a lien on the ship. (*c*) 1 *Atk.* 234.

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writers agree that the maſter has a right to hypothecate the ſhip for repairs made abroad; which ſeems to proceed on the principle of his having a lien on it for expences ſo incurred, for which he would be perſonally liable; for he cannot convey a right to another which he had not himſelf. [Lord *Ellenborough*. One may have a power, who has no lien or intereſt in the thing to be conveyed; as an attorney may do an act to bind his principal, without having any intereſt in the ſubject-matter.] This caſe ſtands on the maritime law, by which the maſter would be perſonally liable for repairs ordered by him: and this is recognized by the law of *England* with reſpect to repairs made abroad: which differs this from the ordinary caſe of attornies or agents, who when treating as ſuch, within the ſcope of their authority, are not perſonally liable. [Lord *Ellenborough*. The maſter's liability muſt depend upon his contract. If he gave notice to the ſhipwright abroad before he made the repairs that he was to look only to the ſecurity of the ſhip and its owners, the maſter would not be perſonally liable.] Perhaps the repairs would not be undertaken without the maſter's perſonal ſecurity; and if his duty and the intereſt of his owners oblige him to enter into contracts for their benefit, for which he is perſonally liable, he ought to have a lien on the ſhip to indemnify himſelf; otherwiſe he will not engage in them, and the ſhip and whole adventure may be loſt. Every lien attaches on the poſſeſſion of the thing; but the poſſeſſion is ſtill in the maſter during the repair; and if he pay the tradeſman, it is the ſame as if he made the repair himſelf. Then why ſhould he not have a lien as well as another? [Lord *Ellenborough*. Have you any caſe where an agent has been held to have a lien for work done by others whom he has ſet to work upon the property of his principal? *Le Blanc* J. The agent is not the per-

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fon doing the work.] If the agent undertake perfonally for it, as between him and his employer, he may be faid to do the work. [Lord *Ellenborough.* Do you derive the mafter's power to hypothecate from his intereft in, or his authority over, the fubject-matter?] The principle on which fuch a power is founded is to enable the mafter to preferve the property in cafes of neceffity, and the fame principle leads to giving him a lien, to encourage him to pledge his perfonal fecurity for the fame purpofe. He cannot even hypothecate the fhip if he can raife the money wanted without it. The mafter has clearly a lien on the cargo for the freight, and he is liable to the feamen for their wages: but if the owner may take fhip and all from him, there would be an end of his lien.

Marryat contrà. Liens for work done arife out of the ufages of trade, and are in derogation of the common law. If the lien in queftion exift at all, it muft be by the ufage of trade; but that has never been recognized by any adjudged cafe, nor has ever prevailed in practice: and no inference can be drawn in its favour from the diftribution of affets or of bankrupts' eftates, by a court of equity, for the benefit of the mafter who has laid out money for the ufe of the fhip abroad, where the fubject-matter was in the hands of the Court. If the mafter had ever been confidered as having a lien, it would have been mentioned in the books which acknowledge his right to hypothecate; but the mention of that alone rather excludes any right of lien in himfelf; and there is no inftance of an hypothecation by a mafter to himfelf. It is clear that the mafter has no lien on the fhip for his wages (*a*) at common law; and the decree in his favour

(*a*) Vide *Abbott* on merchant fhips, &c. 2d edit. 421.

in

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in that refpect, in *Watkinfon* v. *Barnardifton* (*a*), muft have proceeded upon equitable grounds. Nor does it appear that the Mafter of the Rolls meant to fay that he had a *lien*, in the ftrict fenfe of the word, in any cafe; but only that he had a fpecific remedy in rem by procefs in the Admiralty court: for where there was no poffeffion, as in that cafe, there could be no *lien*. Befides, the poffeffion of the mafter is in all cafes the poffeffion of the owners, and not adverfe to them. So his lien upon the freight is for the benefit of the owners as againft the confignees of the goods. The owners therefore, taking poffeffion of the fhip and cargo, take their own lien for the freight at the fame time: nor can the captain prevent them from receiving the freight; for which they may maintain an action in their own names; though the captain may fue in his own name for it. To give the mafter a lien on the fhip would have this bad confequence, that after every voyage the captain would detain poffeffion till his account with his owners was fettled; and they would be often obliged to fubmit to improper charges to avoid the inconvenience and cofts of delay.

Scarlett, in reply, faid that the law of merchants recognized the principle of the lien in queftion, and therefore the common law adopted it. The reafon why the mafter cannot fue in the Admiralty for wages, as the feamen may, is becaufe he has a lien for them on the freight which he is entitled to receive; which lien would be defeated if the fhip might be taken from him. [*Bayley* J. The reafon given in the books why the mafter cannot fue in the Admiralty court for his wages is becaufe he has contracted per-

(*a*) 2 *Pr. Wms.* 367.

 fonally

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ſonally with the owner for them.] Though the poſ-ſeſſion of the ſhip by the maſter be for many purpoſes that of his owners, yet for others he has a diſtinct poſ-ſeſſion from them, and may maintain treſpaſs upon it. In *Juſtin* v. *Ballam* (*a*) it is ſaid that by the maritime law every contract of the maſter implies an hypothecation; though not ſo by the common law, unleſs expreſsly agreed. But many liens, it is well known, have ariſen out of the modern uſages of trade, and each muſt have had a beginning and been adopted in ſome particular caſe.

Lord ELLENBOROUGH C. J. The queſtion ſent for our opinion is Whether in point of law the plaintiff, the maſter, had any lien on the ſhip for money expended or debts incurred by him for repairs done to her on the voyage; and we muſt look into the precedents of the common law to enable us to give an anſwer to it. It is admitted that there is no caſe at law where ſuch a lien has been adjudged to exiſt. And though it be ſaid that there muſt be a beginning in the caſe of liens; yet I diſ-claim the right of originating it now: nor can I, in the abſence of all authority, create a lien in a caſe where none has ever been before allowed, and when every caſe of lien is againſt the common law. How then does the law ſtand in this reſpect? If the repairs be done here, the owners are liable; though the maſter may alſo be-come liable on his own contract, if he do not ſtipulate againſt his perſonal liability, and confine the credit to his owners. If the neceſſary repairs be done abroad, the maſter may hypothecate the ſhip for them, and it is his own fault if he ſubject himſelf to any perſonal liability,

(*a*) *Salk.* 34.

which

which he may renounce. It is ſaid, however, that becauſe he may hypothecate, he may acquire a lien by taking upon himſelf the payment of the repairs: for that the perſons to whom he hypothecates acquire an inchoate lien on the ſhip, inaſmuch as they are entitled by ſuit in the Admiralty court to acquire poſſeſſion of the ſhip itſelf. But it does not follow, becauſe others, through the maſter, and through his hypothecation, may acquire a lien on the ſhip, that therefore he himſelf has ſuch a lien. Liens may be derived through the acts of ſervants or agents, acting within the ſcope of their employment, which they themſelves had not. If a ſervant deliver cloth to a taylor, to make his maſter's liveries, the taylor indeed will have a lien on the cloth for the value of his work; but though the ſervant pay the taylor his charge, that will not give the ſervant a lien on the liveries. As to the caſes in equity, I cannot conſider them as profeſſing to lay down any ſuch rule as that the captain has a lien on the ſhip for repairs done abroad at his charge: the only difference between repairs done here and thoſe done abroad is, that there he may hypothecate, and here he cannot: and the reſult of thoſe caſes is only that, when done abroad, ſteps may be taken for procuring an hypothecation, by which the perſons making the repairs may acquire a lien on the ſhip: but we have no authority, ſitting here, to originate ſuch a lien. The caſe ſent to us involves no queſtion about the maſter's lien on freight, and therefore I ſhall give no opinion upon it. We will certify our opinion to my Lord Chancellor.

On the 30th *May* 1808 the Court certified that they had heard the caſe argued, and were of opinion, that the

plaintiff

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Hussey *against* Christie.

plaintiff had not any lien on the ſhip for the money expended or debts incurred by him for the repairs done to the ſaid ſhip on her ſaid voyage. (Signed)

Ellenborough.
N. Grose.
S. Le Blanc.
J. Bayley.

Tuesday, May 17th.

Millson *againſt* King.

Bail above having been put in and exception entered in the vacation, notice of juſtification for the firſt day of the next term muſt be given within four days after ſuch exception.

ON a former day a rule niſi was obtained for ſetting aſide proceedings on the bail-bond for irregularity. The writ was returnable on the return day of *Hilary* term. Bail above were put in, and notice ſerved in vacation, on the 15th of *February*, and notice of exception given on the 26th; and no notice of juſtification having been given within four days after, the bail-bond was aſſigned on the 7th of *March*: but on the 2d of *May* notice was ſerved of adding and juſtifying bail on the 4th, being the firſt day of *Eaſter* term: and the bail did then juſtify, but it was after this action was brought on the bail-bond.

Andrews oppoſed the rule, on the ground that where bail above is put in and exception entered in vacation, notice of juſtification for the firſt day of the enſuing term ought to be given within four days after ſuch exception; otherwiſe the bail-bond may be aſſigned. Here therefore the bail-bond was properly aſſigned, and the action being regularly brought, the juſtification of bail was too late.

Lawes

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MELLOW *against* KING.

Lawes in support of the rule said, that by the general rule of practice, if the exception were taken in term time, two days notice of adding and justifying bail would have been sufficient(*a*); and it was strange that because the exception was taken in vacation, though the defendant had till the first day of the next term given him to justify, he should be obliged to give a longer notice. And in *Fowlis* v. *Grosvenor* (*b*), where the exception was in vacation, and the bail were justified on the second day of the next term, the Court, in answer to an objection that the defendant had not justified bail within four days after exception taken, with reference to the rule of *E.* 5 *G.* 2.(*c*), said, that two days notice was sufficient: and they therefore stayed the proceedings on the bail-bond.

The Court said, that the first day of the then next term given to the defendant to justify his bail, was only given to him sub modo, if he gave the due notice: and it appeared by a note of the master of a case determined on the meaning of the rule of *Easter*, 5 *G.* 2. that if bail were put in and exception entered in vacation the defendant's attorney must *within four days after such exception entered* give notice of justification for the first day of the next term: and no such notice having been here given, the bail-bond was well assigned, and the proceedings regular.

Rule discharged.

(*a*) Vide 1 *Tidd's Pract. ch.* 6. of bail. (*b*) *Barnes*, 101.

(*c*) Vide New Rules and Orders of K. B. 10.

1808.

Wednesday, May 18th.

WOOD *against* O'KELLY.

Where by the rule of reference *the costs* were *to abide the event of an award*, that includes *the costs* of the *reference* as well as of the *cause*.

UPON a reference under a rule of court, in an action for work and labour, &c., "*the costs* (were) *to abide the event of the award*:" and the master having taxed the costs of the *reference*, as well as of the *cause*, *Bowen* objected, upon shewing cause against a rule for an attachment, that *the costs*, directed to abide the event of the award, meant the costs of the *cause* only, and not of the reference: and upon this he obtained a rule nisi for the master to review his taxation: and mentioned *Tynte* v. *Every* (*a*), *Bracher* v. *Cotton* (*b*), and particularly *Browne* v. *Marsden* (*c*), and *Bradley* v. *Tunstow* (*d*), where the general term *costs* in a rule of reference was considered not to include the costs of the reference. But on this day *The Court*, after hearing *Heath* against the rule, and *Bowen* in support of it, held that the master had done right in including the costs of the reference in his taxation of costs for the plaintiff, in whose favour the award was made. And they considered that the late cases in *C. B.* turned upon the particular terms of the rules of reference.

Rule for reviewing the taxation of costs discharged.

(*a*) *Barnes*, 58. (*b*) *Ibid.* 123. (*c*) 1 *H. Blac.* 223.
(*d*) 1 *Bos. & Pull.* 34.

The KING *against* EMDEN.

Saturday, May 21st.

One was indicted in *Middlesex* for perjury committed in an affidavit, which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a prout patet by the affidavit affiled in the Court of K. B. at *Westminster*, &c. and of this he was acquitted: after which he was indicted again in *Middlesex* for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, in which it was stated to have been sworn in *London*, which was traversed, by an averment that in fact the defendant was so sworn in *Middlesex* and not in *London*: and held that he was entitled to plead auterfoits acquit; for the jurat was not conclusive as to the place of swearing, and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and therefore the defendant had been once before put in jeopardy for the same offence.

IN *Hilary* term 48 *G.* 3. the defendant was indicted in the county of *Middlesex*, for that he, maliciously intending to aggrieve one *G. Witherden*, and to cause 1880*l.* to be indorsed on a writ of capias ad respondendum issued out of *B. R.* with intent to procure *G. W.* to be arrested to answer the defendant, &c. and to compel *G. W.* to find bail for that sum, on the 20th of *November* 1806, at the parish of *St. Andrew*, *Holborn*, in the county of *Middlesex*, came before one *F. G.* deputy filacer of the said court for the county of *Middlesex* (a), *and the deputy of the officer who should issue such process as aforesaid*, and then and there was sworn before the said *F. G.* (the said *F. G.* having competent authority to administer the oath, &c.): and the defendant being so sworn, falsely, maliciously, wilfully, and corruptly swore, in substance, that *G. W.* was indebted to him in 1880*l.* for money had and received, &c.: *upon and at the foot of which said affidavit in writing, as the same affidavit was and now remains affiled in the said court, &c.* (*B R.*) *at Westminster aforesaid in Middlesex, is written as follows, viz. "Sworn at No.* 15. *Furnival's Inn, London, the* 20*th day of November* 1806, *before Fs. Gordon, Dep. Fil. for Middlesex;" whereas in fact the defendant was so sworn and made the same affidavit*

(a) These and the subsequent words in italics were not in the first indictment hereafter mentioned.

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in writing before the said F. G. *in the said county of Middlesex, and not in London*: and then the indictment proceeded to negative the truth of the affidavit of debt; and concluded, "and so the jurors, &c. say that the defendant on the 20th of November 1806 aforesaid, at the parish aforesaid, in the county of Middlesex aforesaid, upon his oath aforesaid, before the said *F. G.* so then and there being such deputy filacer as aforesaid," &c. did falsely, wilfully, and corruptly commit wilful and corrupt perjury.

The defendant, after craving oyer of the indictment, pleaded that the King ought not further to impeach him by reason of the premises therein contained, because, &c.; and then he set out a former indictment preferred and found against him on the 7th of *April*, 47 *G.* 3. at the general sessions of oyer and terminer in and for the county of *Middlesex*; which indictment was in all respects the same as the present, except in the omission of the two sets of words before written in italics, and except that immediately after stating the affidavit of debt sworn to by the defendant before *F. G.* these words were added in lieu of the second set of words in italics, "as by the same affidavit affiled in the said court of our "said Lord the King of the Bench at *Westminster* afore-"said in the county of *Middlesex*, amongst other things, "more fully appears." The plea then continued to set forth the record of the former indictment; that it was removed into *B. R.*; and that the defendant afterwards pleaded not guilty, and was tried before the Chief Justice at *Westminster*, &c., and that the jury found the defendant *not guilty* of the premises charged upon him *in manner and form, &c. as alleged.* Whereupon, there

was

was judgment for the defendant: as by the record and proceedings thereof, &c. at *Westminster*, &c. more fully appeared. Which said record still remains in force, &c. And then the plea alleged " that the affidavit in writing set forth in the indictment against the defendant in this plea mentioned, and therein said to be affiled in *B. R.* at *Westminster* aforesaid in the said county of *Middlesex*, and whereon the supposed perjury charged to have been committed by the defendant therein named was assigned, and of which he was acquitted as aforesaid, and the said affidavit in writing set forth and contained in the indictment now pending against the defendant, now here pleading to the same, and therein also said to be affiled in the *B. R.* at *Westminster*, &c. and whereon the supposed perjury by the said now depending indictment charged to have been committed by the defendant now here pleading is assigned, *is one and the same affidavit, and not other or different:* and that upon and at the foot of the said affidavit in writing in the said indictment in this plea set forth and contained as aforesaid, as the same affidavit then was and remains affiled in *B. R.* at *Westminster*, &c., is written as follows, viz. " *Sworn at No.* 15. Furnival's Inn, London, *the* 20*th day of* November 1806, *before* Frs. Gordon, *Dep. Fil. for* Middlesex;" whereas the defendant was so sworn and made the same affidavit in writing before the said *F. G.* in the said county of *Middlesex*, and not in *London*. And then the plea alleged the identity of the memorandum at the foot of the affidavit last mentioned, with the memorandum at the foot of the affidavit mentioned in the indictment now pending, and that the *Frs. Gordon* mentioned in each is the same, and his authority

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thority to adminifter the oath the fame, &c.; and that the feveral affignments of perjury mentioned in the indictment of which the defendant was before acquitted, and thofe in the pending indictment, are really and fubftantially the fame affignments of perjury, and the offence charged in the former and in the prefent indictment is identically one and the fame, and that the defendant is the fame perfon charged in both. Wherefore, &c.

To this plea there was a general demurrer and joinder.

Abbott, in fupport of the demurrer, argued that there was a material difference between the affidavit fet forth in the former indictment on which the defendant was acquitted, and that fet forth in the prefent indictment; and relied on fuch difference to fhew that the acquittal on the former profecution was no bar to this. A former acquittal, he contended, was no bar to a fubfequent profecution, unlefs the defendant might have been convicted on the firft indictment by proof of the facts contained in the fecond: for which he cited *Vandercom* and *Abbott's* cafe (*a*) in which all the prior cafes were confidered. Both the indictments there were in fact founded on the fame tranfaction; but in the firft they were charged with breaking and entering the dwelling houfe in the night, and *ftealing* the goods of *A. B.* and *C.*; and their acquittal of that charge was held to be no bar to another indictment for breaking and entering the fame dwelling houfe on the fame night, *with intent to fteal* the goods of *A.* and *B.* there. And fo it is faid in *Vaux's* cafe (*b*), that though

(*a*) *Eaft's P.C.* 512, tit. burglary, *ch.* 15 *f.* 29. (*b*) 4 *Co.* 45. *a.*

auterfoits

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auterfoits acquitted or convicted of the same offence be a good plea; yet it is intended of a lawful acquittal or conviction: but when the offender is discharged upon an insufficient indictment, there the law has not had its end, &c. Now here the defendant could not have been convicted on the first indictment by proof of the facts contained in the second. For the first indictment stated that he swore the affidavit, on which the perjury is assigned, in *Middlesex*, and vouched that it would so appear by the affidavit itself affiled in Court; which, though perhaps unnecessary to be stated, made it necessary to prove the allegation by an affidavit which appeared on the face of it to have been sworn in *Middlesex*. Whereas the affidavit stated in the second indictment appears upon the face of it to have been sworn in *London*, though alleged in fact to have been sworn in *Middlesex*. But that shews that the defendant could not have been convicted upon the former indictment. As in *Reading*'s case (*a*), and *Gilchrist*'s case (*b*), in forgery, where the instrument was alleged by the indictment to *purport* to be drawn upon *A. B.*, &c. when in fact, though really meant to be drawn upon those persons, it purported to be drawn in the names of *C. B.*, &c., the prisoners were held entitled to an acquittal. So if a deed were made to *A.* by the mistaken name of *B.*, if it were alleged in an indictment as a deed to *A.*, it would not be proved by shewing a deed to *B.*: but the proper way is to allege that it was made to *A.* by mistake there called *B.* The same in an action on a judgment against *A.* by the mistaken name of *B.*; it must be so averred. In *Rex* v. *Gilbert Gardner*, which was tried before Lord *Kenyon* at the sittings at *Westminster*

(*a*) *East*'s P. C. 981. tit. Forgery, c. 19. s. 56. (*b*) *Ibid.* 982.

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after *Mich.* term 1791, the indictment was for perjury committed on the trial of an action by *A.* against *B.*, in which it was averred that *A.* impleaded *B.* for an assault upon him when *A.* was riding with *C.*, and *B.* was riding with *D.* Whereas the record produced was of an action by *A.* against *B.* for the assault generally, without the special circumstances: and it was offered to prove those circumstances by parol: but Lord *Kenyon* would not allow it; saying that there might be another record of an assault with those special circumstances stated in it; and therefore he directed an acquittal. So here, there might have been another affidavit answering the description in the first indictment. In *Purcell* v. *Macnamara* (a) Lord *Ellenborough* said, "If it (the allegation in the indictment) had gone on to state that the acquittal was on a certain day, *as appears by the record;* that might have been considered as descriptive of the record, and then the variance would have been fatal." The words of reference then in this case made the allegation descriptive of an affidavit which appeared on the face of it to have been sworn in *Middlesex*, which being different from the true affidavit described in the second indictment, the acquittal on the first indictment is no bar to the indictment pending.

The Common Serjeant (*Knollys*) contrà, said that this differed from *Vaux*'s case, and that of *Vandercom* and *Abbott*; in the first there was a defective allegation of the crime of murder by poisoning; in the other, the offences alleged in the two indictments were distinct in specie, though of the same genus. And in each of the cases of *Reading* and *Gilchrist*, the record was at variance with itself; stating that the instrument purported on the face of

(a) *Ante*, 161.

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it to be that which it did not purport to be. Here, however, the first indictment was good upon the face of it, and in truth and substance charged the same offence as that included in the second. The material averments in the last are that the affidavit mentioned in the former indictment, and the affidavit set forth in the indictment pending, *are one and the same affidavit, and not other or different*, and that the *memorandum* at the foot of the affidavit mentioned in each indictment is *the same*; that the assignments of perjury in both are really and substantially the same; and the same person and the same identical offence charged in each. On the first indictment it would have been sufficient to have proved that in fact the affidavit was sworn in *Middlesex*: but even if it were otherwise, the burthening the prosecutor with the proof of an unnecessary averment, which failed, would not warrant the putting of a defendant in jeopardy again upon another indictment in the same county and for the same offence in substance. The very object of the stat. 23 *Geo.* 2. *c.* 11. *s.* 1. was to render prosecutions for perjury more easy, by making it sufficient to set forth the substance of the proceedings together with proper averments of the fact: but if by stating more than is necessary of the substance of the proceedings, and failing in the proof of an unnecessary allegation, the prosecutor could institute another indictment for the same offence, the statute would be made an engine of oppression. The plea of autersoits acquit is not confined to cases where the second indictment is in the same identical *form* as the first. If a prisoner be indicted for the murder of one *unknown*, and be acquitted; to another indictment for the murder of *A. B.*, he may plead his former acquittal, and aver that *A. B.* named in the second indictment was the

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person before said to be *unknown*. *Dy.* 285. *a.* and *Staunf. P. C.* 105. (*a*). The only new fact alleged in the present indictment is that at the foot of the affidavit there was a certain memorandum stating it to have been "sworn at No. 15, *Furnival's Inn, London*," &c. but by whom written, whether by any person having competent authority to put it there, does not appear.

The Court, having asked *Abbott* what answer he had to make to the last observation; and he saying that it appeared to be so stated in the jurat, which was a necessary part of the affidavit, of which the Court would take judicial notice; they observed that the memorandum was not stated to be the *jurat*: it only appears to be written before the affidavit was filed, but it does not appear when that was filed. Neither do the rules of the Court require the *place* where the affidavit is sworn, but only the names of the deponents, to be stated in the jurat; though in fact it is stated where the affidavit is sworn, whether in court, or at the Judge's chambers.

Abbott replied that the Court would take notice of their own practice in stating the place where an affidavit is sworn, though not required by any written rule of Court: and, unless the place had been stated, he doubted whether any Court would have received the affidavit. *Bayley* J. however said that in a late case in *C. B.* it was considered that the place where the affidavit was sworn was not necessary to be stated in the jurat. And he asked whether it were meant to be contended that a defendant could not be indicted for perjury committed in an affidavit, without stating the jurat: and if not, whe-

(*a*) Vide 2 *Hawk. ch.* 35. *f.* 3.

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ther the ſtating at the foot of the affidavit, that it was ſworn at a certain place, made the place part of the iſſue? In an action on a bond, it is ſtated that the bond was executed at ſuch a place; but the place is no part of the iſſue. *Abbott* admitted that it was not neceſſary in an indictment for perjury in an affidavit to ſtate the jurat, the ſtat. 23 *Geo.* 2. having made it ſufficient to ſet forth the ſubſtance of the proceedings. But, in anſwer to the other queſtion, he obſerved that in an indictment for perjury the place was material to be laid and proved, which it was not in the caſe of an action on a bond.

Lord ELLENBOROUGH C. J. It appears to me that the jurat is not a neceſſary part of an affidavit to be ſtated in an indictment aſſigning perjury in ſuch affidavit: it is only neceſſary to ſtate ſo much of it as conſtitutes the crime; namely, that which contains the falſe oath, together with the averments proper to ſubſtantiate the perjury. If ſo, there was a ſufficient indictment found in the firſt inſtance, on which the party has been tried and acquitted of the ſame offence as is now charged by the ſecond indictment; and therefore ſuch acquittal is a good plea in bar to the preſent indictment. It is quite a different queſtion whether a party producing an affidavit, which appears on the face of it to have been ſworn in *London*, and proving it to have been ſworn elſewhere, is fit to be believed; that would be a queſtion for the jury: but on the record of the firſt indictment the offence was ſufficiently charged without ſetting forth the jurat, by which it is ſtated to have been ſworn in *London*; and the production of that jurat on the trial of that indictment would no otherwiſe have affected it, than as it affected the credit of the perſon ſwearing to the fact of the affi-

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davit having been ſworn in *Middleſex* where the trial was had. The whole crime therefore might have been tried on that indictment, and the defendant was in jeopardy upon it, and conſequently his acquittal is a bar to the preſent proſecution.

Grose J. declared himſelf of the ſame opinion.

Le Blanc J. The firſt indictment was ſufficient in the frame of it, and is the ſame in effect as the indictment now pending, except in not ſtating the jurat: and unleſs the jurat be a neceſſary part of the affidavit to be ſtated in an indictment for perjury aſſigned on ſuch affidavit, which I think it is not, the difference between the two indictments is not material. Then the ſecond indictment ſet forth the jurat, which ſtates that the affidavit was ſworn in *London*, with an averment that the defendant was ſworn and made the affidavit in *Middleſex*, and not in *London*. But that averment does not let in the proof of any fact that might not have been given in evidence on the firſt indictment: how credible, it is not neceſſary to inquire. Therefore the defendant, having been in jeopardy upon that indictment for the offence with which he now ſtands charged, is entitled to plead his former acquittal in bar.

Bayley J. The preſent indictment itſelf ſuppoſes that the jurat is not concluſive evidence of the place of ſwearing the affidavit, becauſe it expreſsly avers that it was ſworn in *Middleſex* and not in *London*, as ſet forth in the jurat. Then if the jurat be not concluſive as to the place, the ſame evidence would have ſupported the firſt indictment as would be required to ſupport the ſecond; and

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and therefore the defendant having been once in jeopardy for this offence, his acquittal is conclusive.

Judgment for the Defendant.

MARSHALL *against* CRITICO.

Monday, May 23d.

One who had been appointed Consul General from the *Porte*, but was dismissed several months before from his employment, and another person resident here appointed in his room, is not at any rate privileged from arrest, though at the time of the arrest he had not received any official notification of his dismissal, or of the appointment of the other.

BURROUGH moved to discharge the defendant from an arrest, on filing common bail, on the ground of his privilege, under the stat. 7 *Ann. c.* 12. as being consul general from the *Porte*, and invested with a superintending authority over the *Turkish* consuls in the different sea-port towns, and not an ordinary consul or agent for commercial purposes; in which respect he distinguished this from *Barbuit*'s case (*a*). But he also stated from the affidavit, that some months previous to the arrest, the defendant had in fact been dismissed from his employment, and another person of the name of *Natali*, who was before residing here, had been appointed in his place; but the defendant had then received no official notification of his dismissal, and continued in fact to exercise his office here until after the arrest. And he contended that the defendant's privilege did not cease until notification at least of his dismissal, and reasonable time to depart the kingdom if he thought fit. It did not however appear that he had had any intention of departing.

Lord ELLENBOROUGH C. J. This is not a privilege of the person, but of the state which he represents. And that

(*a*) *Cas. temp. Talb.* 281., and vide *Lord Mansfield*'s account of the same case in *Triquet* v. *Bath*, 3 *Burr.* 1480—1.

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that state having some months before devested him of the character in which he claims the privilege, and appointed another person here to exercise it; there is no just reason why the defendant should not be subject to process as other persons; nor for the state, by which he had been so dismissed from his employment, to take offence at his arrest.

Per Curiam, Motion denied.

Tuesday, May 24th.

DOE, on the demise of BELASYSE and Lady CHARLOTTE WYNN BELASYSE, his Wife, *against* The Earl and Countess of LUCAN.

One having a *freehold manor of Sutton*, and freehold lands there, and having also *copyhold* within the *township* of *Sutton*, and within the local ambit of the manor, but held of another manor; and having surrendered his copyhold to the use of his will; devised all his *manor* of *S.*, and all his messuages, *farms*, lands, tenements, and hereditaments, whatsoever, *within the precincts and territories* of *S.* in the county of *Chester*, with their rights, members, and appurtenances, in trust for his daughter *L.*, (having devised other estates in other counties to two other daughters) and to her children in strict settlement: held, 1. That farms, lands, &c. within the *township*, though not within the *manor*, of *Sutton*, passed by the description of farms, &c. within the *precincts and territories of S.* 2. That the general words "messuages, *farms*, lands," &c. and particularly the word *farms*, were sufficient to carry *copyhold* as well as freehold in the place described, if such appeared to be the intent of the testator upon the whole will. 3. That such intent was evinced in this case by the word *farms*, where it appeared that the testator had a farm composed of copyhold and freehold, which he had let as one entire subject, and which must otherwise be divided; and also by this, that he had charged the property devised beyond the annual income of it unless the copyhold were included. And that this intent was not rebutted by a power of leasing for 21 years given to all the tenants for life; nor by power to the trustees to raise portions by grants of long terms of years. 4. That a small copyhold distant eight miles, and a small freehold 20 miles from *Sutton*, but within the county of *Chester*, did not pass by that devise, but did pass under a general residuary clause to another daughter.

IN ejectment for copyhold or customary lands, part of which are locally situated within the township and freehold manor or reputed manor of *Sutton*, and part in the township of *Kettleshulme*, without the manor of *Sutton*; and all of which copyhold or customary lands are held of the manor and forest of *Macclesfield*; and also for

freehold lands in the parish of *Northwich* in the same county, and not within either of the said manors; a verdict was taken for the plaintiff, at the trial at *Chester*, subject to the opinion of this Court upon the following case. 1808.

Doe dem. Belasyse against The Earl of Lucan.

Henry late Earl of *Fauconberg* being seised in fee of the freehold manor of *Sutton*, and of divers freehold lands and premises within the manor; and being also seised in fee of the freehold premises in *Northwich*; and being entitled in fee simple, according to the custom of the said manor and forest of *Macclesfield*, to all the said copyhold or customary premises; which several freehold and copyhold or customary premises formed the whole of his estate in the county of *Chester*: and being also seised in fee of divers other large freehold, but no copyhold, estates, in the counties of *York*, *Durham*, and *Middlesex*: and having no male issue, but having three daughters, viz. Lady *Charlotte Wynn Belasyse*, one of the lessors of the plaintiff, Lady *Anne Wombwell*, wife of Sir *George Wombwell* Bart., and *Elizabeth* Countess of *Lucan* one of the defendants: and having surrendered all his copyhold estates to the uses of his will: by his will duly executed, dated the 26th of *November* 1801, devised certain freehold estates in *Yorkshire* and *Middlesex*, being the bulk of the property, to trustees for a term of years, in trust to raise and pay to Lady *C. W. Belasyse*, for her separate use, an annuity of 1000*l.* per annum for her life; remainder to herself for life; remainder to her first and other sons successively in tail; remainder to her daughters, as tenants in common, in tail; with divers remainders over. And also devised other freehold estates in *Yorkshire* and *Durham*, as follows.—As to all and singular the manors or reputed manors of *Yarm*, *Old Byland*, *Over Silton*, and

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and *Lund*, and all my messuages, *farms*, lands, tenements, and hereditaments whatsoever, within the precincts or territories of *Yarm*, *Old Byland*, *Over Silton*, *Nether Silton*, *Leek*, and *Lund*, in the North Riding of the county of *York*, and *Kenknowle* and *Copycrook* in the county of *Durham*, with their respective rights, members, and appurtenances, I devise the same unto Lord Viscount *Melbourne* and Sir *George Wombwell* Bart. their executors, &c. for 99 years, if Lady *Anne Wombwell* shall so long live; in trust out of the rents and profits of the said manors and hereditaments, to raise 500*l.* per ann., clear of all deductions, for Lady *Anne Wombwell*, for her separate use, &c.; remainder to the said Lady *Anne* for life; with divers remainders over. And also devised as follows—As to all and singular *the manor or reputed manor of* Sutton, and all my messuages, *farms*, lands, tenements, and hereditaments whatsoever, *within the precincts or territories of* Sutton in the county of *Chester*, with their rights, members, and appurtenances, I give and devise the same to Lord Viscount *Melbourne* and Sir *G. W.* Bart., their executors, &c. for 99 years, if Lady *Lucan* shall so long live; in trust out of the rents and profits of the said manor, hereditaments and premises, to raise and pay 500*l.* per ann., clear of all deductions, to Lady *Lucan* for her separate use, &c.; remainder to the use of Lady *Lucan* for life; remainder to her first and other sons by the Earl of *Lucan* successively in tail; remainder to her daughter as tenants in common in tail; and divers remainders over; and the ultimate remainder, as to the whole of the said estates, to the use of the testator's own right heirs. And the testator empowered the several tenants for life, male or female, in possession and of age, to limit 500*l.* per ann. for life, clear of

of all deductions, for the use of any person or persons with whom they might respectively intermarry, to be charged upon the said manors and other hereditaments to them respectively devised, and secured by the usual powers of distress and entry, &c. And also that such tenants for life should have power to charge all or any part of the manors and other hereditaments to them respectively devised with portions for younger children, not exceeding 24,000*l.* for the younger children of Lady *C. W. Belasyse*, and 10,000*l.* respectively, for the younger children of Lady *A. Wombwell*, and of Lady *Lucan*, with interest not exceeding 5 per cent., &c. And for this purpose to limit or appoint all or any part of the hereditaments so to be charged to any persons for any term of years, without impeachment of waste. The testator also directed that the several tenants for life should have power to limit and appoint the said lands and other hereditaments, or any part thereof, with their appurtenances, by way of lease or demise for any term or number of years not exceeding 21 years in possession, at the best rent, &c. And also gave power to the same to grant building leases, &c. for any term not exceeding 99 years in possession, at the best rent, &c. The testator also directed that Lady *C. W. Belasyse*, and the several manors and hereditaments first limited in use for her life, with remainder to her first and other sons, and daughters, in tail, should be subject to, and should actually exonerate, the several other hereditaments, manors, and premises so as aforesaid originally limited in use to Lady *A. Wombwell* and Lady *Lucan*, and their several and respective sons and daughters in tail, from land-tax, modus, rent, fee-farm rents, prescript rents, curates' stipends or salary, and pensions to poor widows, and all such other incumbrances

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brances as were then actually charged thereon and payable by him, and also from the salary of the receiver of rent of the said estate devised to Lady *Lucan*. And the testator devised all the rest, residue, and remainder of his real and personal estates whatsoever and wheresoever, except those he held on mortgage or upon any trusts, unto Lady *C. W. Belasyse*, her heirs, &c. and died on the 23d of *March* 1802. The testator was not, at the time of making his said will, seised of any other real estates than those before mentioned. After his death Lord and Lady *Lucan* entered into and continue in possession of all the freehold and copyhold premises for which this ejectment was brought. The case then stated the presentment of Earl *Fauconberg*'s will by the homage at the manor and forest court of *Macclesfield*; and the admission of Lord *Melbourne* and Sir *Geo. Wombwell* to the said copyhold or customary premises locally situated within the township and freehold manor or reputed manor of *Sutton*, and also to the copyhold or customary premises situate in the township of *Kettleshulme*, to hold for 99 years if Lady *Lucan* so long lived. That the manor of *Sutton*, and the freehold lands situated within that manor, devised to the defendants, were, at the time of making the will, of the annual value of 800*l.* and upwards; and the copyhold or customary lands at *Sutton* were then also of the annual value of 800*l.* and upwards; and that the freehold lands at *Northwich* were then of the annual value of 19*l.*; and the copyhold or customary lands at *Kettleshulme* were then of the annual value of 39*l.*: and that one modus of 4*l.* per annum, payable to the impropriator of the parish of *Prestbury*, covers as well the freehold lands at *Sutton*, as 700 acres of the copyhold or customary lands there. Part of the above-mentioned

copyhold

copyhold or customary estates at *Sutton* and *Kettleshulme* were purchased by the testator's father, *Thomas* Lord *Fauconberg*; and they, as well as the freehold estates within the manor of *Sutton*, were enjoyed by the testator and his father during their respective lives. At the time of making the will one *John Grimsditch* held a farm at *Sutton* consisting of 261 A. 2R. 8P., of which 200A. 24R. 0P. are freehold, and 61 A. 1R. 24P. are customary or copyhold land, under a lease granted to him by the testator for the term of 21 years from *Lady-day* 1789; but since the testator's death *John Grimsditch* has surrendered the term thereby granted. *Kettleshulme* is distant eight miles, and *Northwich* is distant 20 miles from the extremity of the manor and township of *Sutton*. The lessors of the plaintiff were previously to the commencement of this ejectment duly admitted to all the copyhold premises comprised in the ejectment at the manor and forest court of *Macclesfield*. There are no copyhold lands held of the manor of *Sutton*. The question for the opinion of the Court was, Whether the lessors of the plaintiff were entitled to recover the freehold and copyhold estates, or any and what part thereof?

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Benyon for the plaintiff. The question principally arises on the devise to trustees for the benefit of Lady *Lucan* and her issue of "all and singular the manor or reputed "manor of *Sutton*, and all my messuages, farms, lands, "tenements, and hereditaments whatsoever *within the "precincts or territories of* Sutton, in the county of *Ches-"ter*, with their rights, members, and appurtenances." The property of the devisor contended by the defendants to come within the above description is, 1. The manor

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of *Sutton*, and a freehold eftate within that manor of about 800*l.* a-year. 2. A copyhold eftate of the fame value, locally fituated within the ambit of the townfhip and manor of *Sutton*, though no part of that manor, but parcel of the manor and foreft of *Macclesfield*. 3. A fmall copyhold at *Kettlefhulme*, within the manor and foreft of *Macclesfield*. And, 4. a fmall freehold in *Northwich*, not within either of the manors. As to the 1ft, the leffors admit that the manor of *Sutton* and the freehold eftate within that manor paffed to Lady *Lucan* under the claufe above mentioned. 2dly, The copyhold eftate within the ambit of *Sutton*, but parcel of the manor and foreft of *Macclesfield*, did not pafs by that claufe; firft, becaufe it is not "*within the precincts or territories of* Sutton," by which muft be underftood the *manor of* Sutton; and therefore not within the defcription of the thing devifed. If it had been faid "within the precincts and territories of the *manor* of *Sutton*," the meaning would have been clear not to pafs this copyhold, which is no part of that manor, but parcel of the manor and foreft of *Macclesfield*; according to 2 *Rol. Rep.* 236. and 15 *Vin. Abr.* title *Manor*, C.: and the ambiguity only arifes, becaufe there is a *townfhip*, as well as a *manor*, of *Sutton*: but in no part of the will does the teftator allude to the *townfhip* of *Sutton* by name. Under this defcription nothing can pafs within the *ambit* of *Sutton*, which is not alfo within the *manor*, though the copyhold was occupied conjointly with the freehold: as in *Doe* v. *Greathead* (*a*). [*Le Blanc* J. That was a devife of lands confined by the defcription to one county, which was held not to include other lands in the fame manor which

(*a*) 8 *Eaft*, 91.

were

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were in another county. Lord *Ellenborough* C. J. The teſtator in the preceding clauſe of his will ſpeaks of lands, &c. "within the *precincts and territories*" of places diſtinct from the *manors* there mentioned; which ſhews that he meant ſomething unconnected with manors. Can you with effect contend that the copyhold within the ambit of *Sutton* did not paſs?] There is another reaſon why this copyhold did not paſs by the general deſcription of lands, &c. becauſe there is a *freehold* eſtate to anſwer the deſcription; in which caſe the rule of law, as laid down in *Roſe* v. *Bartlett* (*a*), in reſpect of leaſehold applies; namely, that the *freehold* only ſhall paſs under the general words *lands*, &c. And this is confirmed in *Lindopp* v. *Eboratt* (*b*), and in *Thompſon* v. *Lawley* (*c*): and copyhold is of leſs intereſt in law than leaſehold. [*Groſe* J. Where the intention is left doubtful upon the words of the will, that argument would have weight; but not where there is an apparent intention to paſs the copyhold. Lord *Ellenborough*. The teſtator never once mentions copyholds in his will; but only uſes general words: and can we ſuppoſe that in each inſtance he meant to ſeparate his copyhold from his freehold? Does it not appear that he intended every thing to paſs within the ambit of *Sutton*?] The will appears to have been drawn by one who underſtood the legal effect of words: and the teſtator gives power to the truſtees to limit terms of years for raiſing portions; and to the tenants for life, to leaſe for 21 years, &c.; powers which are inapplicable to copyholds. If then the copyhold did not paſs under the firſt clauſe, it paſſed to the

(*a*) *Cro. Car.* 293. (*b*) 3 *Bro. Ch. Caſ.* 188.

(*c*) 2 *Boſ. & Pull.* 303. and 5 *Veſ. jun.* 476. and *vide* the ſame queſtion diſcuſſed as to copyholds in *Doe* v. *Vernon*, 7 *Eaſt*, 20.

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lessor in fee under the residuary devise; in which general words are sufficient to pass copyhold, according to *Doe* d. *Pate* v. *Davy* (a), *Car* v. *Ellison* (b), and *Andrews* v. *Waller* (c): and for this purpose the surrender to the use of the will was necessary. 3dly and 4thly, As to the small copyhold at *Kettleshulme*, and the small freehold in *Northwich*, it is clear they could not pass by the first clause, being without the ambit of *Sutton*; and therefore they passed under the residuary clause.

Richardson, contrà. The most material question is upon the copyhold within the precinct or territory of *Sutton*; which description cannot be confined, as contended, to lands within the *manor* of *Sutton*. Lands within the ambit of one manor may be parcel of another manor: and the knowledge of that circumstance in the particular instance by the testator accounts for the generality of the description of the lands, as lying within the *precinct or territory*, instead of saying the *manor*, of *Sutton*. And this is the stronger as he had before named the *manor*. The legal import of any place described by name, without more, is that it is a *township*. But it is said next, that the general words, *lands*, &c. in the first clause, there being *freehold* to answer the description, will not pass *copyhold*, even where it has been surrendered to the use of the will: but the cases in equity, which were decisions not merely on equitable points, but on questions whether the legal estate passed, shew that the rule is not general; but that where copyhold has been surrendered to the use of the will, it will pass as well as freehold by general words: as *Hassllewood* v. *Pope* (d); which though it was a

(a) *Dougl.* 716. note. (b) 3 *Atk.* 73.
(c) 6 *Vin. Abr.* 237. *Copyhold*, W. e. *pl.* 12. (d) 3 *P. Wms.* 322.

devise

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devise for payment of debts, yet the judgment did not turn on that consideration: and *Tendril* v. *Smith* (a), and *Goodwyn* v. *Goodwyn* (b), where the point was ruled generally, upon the words "messuages, lands, tenements, and hereditaments." In addition to which the will in question has the word *farms*. In *Byas* v. *Byas* (c) the copyhold was held not to pass by general words only, because it was not surrendered to the use of the will. The situation of the testator's family, the local situation of this property, and the disposition of the rest of his estate, all shew his intention to pass the copyhold in question by the general words used to Lady *Lucan*. He had three daughters and no male descendant: to the eldest he gave the bulk of his estates, lying in *Yorkshire*, and the property in *Grosvenor Square*: to the second, a considerable estate in *Yorkshire*, lying at a distance from the former, together with another estate in *Durham*: to Lady *Lucan*, his other daughter, he gave his estates in *Cheshire*, containing the manor of *Sutton*, and also his *farms*, *lands*, &c. within the *precincts or territories* of *Sutton*, with their "rights, members, and appurtenances." The subsequent clauses, charging the property devised to the eldest daughter with certain payments of land tax, receivers' salary, &c., were evidently for the purpose of equalizing this distribution a little more in favour of the younger daughters: it is therefore highly improbable that when the testator made no distinction in terms between his freehold and copyhold, which were held and enjoyed by him together as one estate, and partly leased together, and which were subject to the same modus and charges; he should still have meant to sever the copyhold from the freehold in favour

(a) 2 *Atk.* 85. (b) 1 *Ves.* 226. (c) 2 *Ves.* 164.

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of his eldeſt daughter, to whom he had before given the bulk of his property ſituated at a great diſtance. 3dly, and 4thly, Theſe obſervations will in part apply alſo to the two ſmall farms, in the vicinity of *Sutton*; namely, the copyhold at *Kettleſhulme*, 8 miles off, of the annual value of 39*l.*, and the freehold at *Northwich*, 20 miles off, worth 19*l.* per ann.; which might be conſidered as *appurtenances* to the *Sutton* eſtate, and would certainly be included with it in the charge of the receivers' ſalary, which was thrown upon the property deviſed to the eldeſt daughter, in exoneration of that deviſed to the younger daughters. In *Cro. Eliz.* 113. a deviſe of a tenement, *with the appurtenances*, in which *H. B.* dwelleth in *Ebley*, was held to paſs land appurtenant, though it were out of *Ebley*. [Lord *Ellenborough*. There is nothing ſtated here to ſhew that theſe farms were enjoyed as *appurtenant* to the property in *Sutton*: one was 8, and the other 20 miles apart from it.] The property deviſed to Lady *Lucan*'s truſtees may poſſibly not be ſufficient, without theſe farms to defray the contingent charges upon it, which are 500*l.* a-year clear of all deductions for herſelf, the like annuity for her huſband, and 10,000*l.* for younger children, with intereſt at 5 per cent. [*Le Blanc* J. The intention of the teſtator to include theſe farms may be probable enough; but the difficulty is to find any words in the will capable of carrying them.]

Benyon in reply, as to the great copyhold in *Sutton*, (to which alone his attention was called by what had fallen from the Court) obſerved with reſpect to the caſes in equity, where general words had been held to carry copyhold, that they turned either upon deviſes in favour of creditors; or upon queſtions between heir and deviſee, where

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where when the heir elected to take fomething devifed to him under the will, a court of equity would oblige him to conform to the general directions of the will in favour of the other devifees. *Hazlewood* v. *Pope* (*a*) was a devife in favour of creditors; in which cafe, a furrender fhall be fupplied. But in *Lindopp* v. *Eborall* (*b*), Lord Chancellor would not fupply a furrender even in favour of a child which was otherwife provided for. It does not appear how the queftion arofe in *Tendril* v. *Smith* (*c*); but the generality of the propofition there faid to be laid down is againft the whole current of authorities. And in *Goodwyn* v. *Goodwyn* (*d*) there were introductory words, fhewing a general intention in the teftator to pafs *all* his eftate. No inference can arife of fuch an intention here in favour of Lady *Lucan* from the furrender to the ufe of the will, becaufe that was neceffary to pafs the copyhold by the refiduary devife. Nor can it arife from the charge on Lady *C. W. Belafyfe* to pay the falary of the receiver for Lady *Lucan*; for it does not follow from thence that *all* the property in *Chefhire* was to pafs to the latter. Then the power of leafing, &c. affords a much ftronger argument againft the teftator's intention to pafs the copyhold by the firft claufe, than that derived from the value of the eftate devifed to Lady *Lucan* in fupport of fuch intention: for the charges need not all be laid on at once.

Lord ELLENBOROUGH C. J. Sufficient appears upon the face of the will to fatisfy me, without doubt, of the intention of the teftator to give to Lady *Lucan* the copyhold within the townfhip of *Sutton*. The teftator was

(*a*) 3 *P. Wms.* 322. (*b*) 3 *Bro. Chan Caf.* 188.
(*c*) 2 *Atk.* 85. (*d*) 1 *Vef.* 226.

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feized of three principal eftates, partly freehold, partly copyhold; and had three daughters: and having furrendered his copyholds to the ufe of his will, he devifed the bulk of his property lying in the North Riding of *Yorkfhire*, together with what he had in *Middlefex*, to Lady *Charlotte*. Another eftate in the North Riding at a diftance from the firft mentioned, together with that in *Durham*, he devifed to Lady *Anne*. He had a third eftate in *Chefhire*, the principal part of which is in *Sutton*, and the reft confifted of two detached fmall farms, the one eight, the other 20 miles from *Sutton*: and he devifed to Lady *Lucan* and her family "all and fingular the "manor or reputed manor of *Sutton*, and all my mef-"fuages, farms, lands, tenements, and hereditaments "whatfoever *within the precincts or territories* of *Sutton* "in the county of *Chefter*, with their rights, members, "and appurtenances." The principal queftion is whether the copyhold within the townfhip, but not parcel of the manor of *Sutton*, paffed by this devife to Lady *Lucan*? For if not, the teftator having given to Lady *Charlotte* all the reft and refidue of his real eftates, it is clear that the refiduary claufe would carry every thing, copyhold as well as freehold, which he had not before devifed. In conftruing the devife in queftion I fhall proceed merely on the teftator's intention as I collect it from the face of the will; for I am afraid to look at any argument of intention to be derived from the furrender to the ufe of his will; though perhaps it may be proper to be regarded even in this court, as it certainly would be in another court: but it is not neceffary for me to give any opinion upon that point; for I profefs to determine this cafe upon the intention, as collected from the words of the will only. The words of the claufe are general, and whatever

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whatever those words may legally comprehend is, and was, I think, meant to be given to Lady *Lucan*. First he gives her his manor or reputed manor of *Sutton*. Then he gives her all his messuages, *farms*, lands, tenements, and hereditaments whatsoever, not within the *manor*, but *within the precincts or territories of* Sutton. If the words "lands, tenements, and hereditaments" only had been used, I admit that they would be confined to that which has been construed to be the natural and legal sense of those words; namely, freehold, if the intention of the will could be satisfied by applying them to freehold only: but if the intention of the testator could not be satisfied without extending the words to copyhold, then they would comprehend both. Here, however, there are other words; "*farms*," "with their appurtenances." Why may not *farms* include copyhold as well as freehold? But out of all the words used I would look to see what must have been the intention of the testator. Upon a freehold estate of 800*l.* a-year, it must be contended by the plaintiff's counsel, that the testator meant to charge 500*l.* a-year for the separate use of Lady *Lucan*, and 500*l.* a-year interest for younger children's portions, without looking to the contingent additional charge of 500*l.* for her husband. The fund would then be short and defective for the purposes which he had directly in his contemplation. Can such an intention then be reasonably imputed to the testator, and from what words of the will are we to collect it? The words used are general; the word *farms*, at least, would include copyhold as well as freehold; and I should think that even *lands, tenements, and hereditaments* might include both, if such a construction were necessary to give effect to the apparent intention of the testator; and here his intention, as it

appears from the charges which he has laid upon the property devised to Lady *Lucan*'s trustees, cannot be satisfied without giving the word *farms* at least this interpretation. Then I see no ground for restraining the sense of the general words, "*within the precincts and territories of* Sutton," to the *manor* of *Sutton*. The contrary intention is, I think, to be collected from the testator's first mentioning the *manor* of *Sutton*, and then extending his description of the property devised to *all his messuages, farms*, lands, &c. *within the precinct or territories* of *Sutton*. And this is confirmed by the former clause of devise to Lady *Anne*, where, after mentioning certain manors by name, he goes on to describe other messuages, farms, lands, &c. *within the precincts or territories* of places not coming within the description of the manors before mentioned. Therefore construing one part of the will by the other, it appears to me that the description of the *manor* of *Sutton* does not over-ride the whole clause, but that by *the precincts and territories* of *Sutton* in the latter part of it, the testator meant the *township* of *Sutton*. Founding my opinion, therefore, upon the apparent intention of the testator as I collect it from the words of the will, coupled with the facts of the case to which those words apply, I think that the copyhold within the township of *Sutton* passed by the clause in question to Lady *Lucan*. But the two small farms, the one copyhold, the other freehold, lying out of *Sutton*, will pass by the residuary clause; not being comprised within any of the words of description of the prior clause. I lay no stress on the subsequent clause respecting the charge of the receiver's salary, or the modus which covers the copyhold as well as freehold land in *Sutton*.

GROSE J. Both from the words of the devise, and from the apparent intention of the testator on the whole of the will, I think that the copyhold in *Sutton* passed to Lady *Lucan*'s trustees; and that the other small estates out of *Sutton* passed by the residuary clause. I do not rely on the surrender to the use of the will; though I think it would be extraordinary if that were to pass copyholds to the lessors of the plaintiff and not the copyhold in *Sutton* to the defendants. But here are words large enough to comprehend the copyhold as well as freehold in *Sutton*, namely, messuages, *farms*, lands, &c. within *the precincts and territories* of *Sutton*; and the intention to pass the copyhold there is quite clear for the reasons which my Lord has stated, and which it is not necessary to repeat. And though it has been argued from authorities, that general words in a will shall not be construed to carry copyhold where there is freehold to satisfy them under the same description; yet that must be understood of cases where there is no apparent intention to pass the copyhold; which is clearly otherwise in the present case.

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LE BLANC J. As to the small copyhold and small freehold lying out of *Sutton*, whatever one's belief may be as to the testator's intention to devise them to Lady *Lucan* they cannot pass to her, because there are no words sufficient to include them. But as to the copyhold within the township of *Sutton*, the situation of the testator in respect of this property is fit to be considered. He had surrendered his copyholds to the use of his will; and, so far, they were deviseable property. He had let a considerable part of the copyhold in *Sutton*, together with the freehold there, to a farmer; and therefore he

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was at the time of making his will possessed of a *farm* in *Sutton*, consisting of both copyhold and freehold, let for 21 years. So circumstanced he devises to Lady *Lucan* his manor of *Sutton*, and all his messuages, *farms*, lands, within the precincts and territories of *Sutton*, with their rights, members, and appurtenances. Now taking it for granted, for the present, that a devise, simply, of *lands, tenements, and hereditaments*, where there is freehold to answer the description, will not pass copyhold; yet the question is, Whether the Court do not see a manifest intention of the testator in this case to pass the copyhold in *Sutton?* First, he gives to Lady *Lucan* the *manor* of *Sutton*; and then he gives all his messuages, farms, lands, &c. within the *precincts and territories* of *Sutton*, not saying within the *manor*, &c. We must therefore take it that by the change of expression he meant something more than the manor, which must be the township of *Sutton*. In addition to that I cannot but think that when, having a farm consisting of freehold and copyhold, which latter was within the township, but not within the manor of *Sutton*, he gives all his farms and lands, &c. in *Sutton*, he must have meant to pass both the copyhold and freehold lands within *Sutton*. Then again when it is considered that he had only freehold in *Sutton* to the amount of 800*l.* per annum, I cannot think that he meant to devise that alone, limited too as it is in strict settlement, when he lays such large charges upon it; 500*l.* a-year to Lady *Lucan*, and 10,000*l.* for younger children, with power to her to charge the estates with 500*l.* per annum for her husband. The amount of these charges afford a strong argument, when we are considering the intention of the testator, to shew that he meant to include the copyhold as well as freehold in *Sutton*.

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BAYLEY J. If it had been neceffary to decide whether the general words, "lands, tenements, and hereditaments," would pafs copyhold as well as freehold, without other circumftances to fhew an intention to include both, I fhould have defired time to look into the authorities; but I think there are circumftances in this cafe which clearly evince fuch an intention. For, firft, the teftator had an undivided farm confifting of freehold and copyhold; and if he did not mean to pafs both, it muft be divided. Therefore when he ufes the word *farm*, which applies to the entire fubject, it raifes a prefumption that he did not mean to divide it. Then the charges which he has laid upon the property devifed would be greater than the amount of the freehold alone; which is another circumftance to fhew his intention to include the copyhold in *Sutton*. As to the fmaller eftates of copyhold and freehold lying out of *Sutton*, there are no fufficient words to pafs them to Lady *Lucan*, and therefore they will pafs to the leffors under the refiduary claufe.

Poftea to the Leffors of the Plaintiff as to the fmall freehold and fmall copyhold eftate out of *Sutton*; and to the Defendant as to the reft of the property.

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Wednesday, May 25th.

It does not appear that the freemen and liverymen of *London* are exempted from being impressed for the sea service, if in other respects fit subjects for that service.

The KING *against* YOUNG.

GARROW moved for a writ of habeas corpus to bring up the defendant, a waterman and lighterman on the *Thames* who had been impressed, for the purpose of his discharge; on affidavits stating that he was a freeman and liveryman of the city of *London*, and as such claimed to be exempted from being impressed by reason of certain charters of *Ed.* 2. and *Ed.* 3. confirmed by act of parliament and by the usage in that behalf. And he referred to the instance of one *Millachip* a freeman and liveryman of *London*, who having been impressed in 1777 applied for a writ of habeas corpus for his discharge on the ground of his privilege; and, pending the inquiry, was discharged by order of the admiralty. And upon a similar application to the Court of C. B. in 1792 from another liveryman who had been impressed, a similar result took place.

The Court, however, after hearing those parts of the charters read which were referred to in the affidavits, and which certainly did not contain any exemption from the service in question in distinct terms, but rather seemed to refer to an exemption of the citizens in those times from being drawn out by the King to serve as soldiers extra civitatem, refused the writ: Lord *Ellenborough* C. J. saying, that there did not appear to be any foundation for the exemption claimed from a service, which this description of persons in every part of the country were equally bound to give in their avocation for the defence of the realm when necessity called for it.

Rule denied.

The KING *against* The Sheriff of SURRY, in the Cause of MORRIS *v.* DUFFIELD.

Wednesday, May 25th.

Where the rule for an attachment against the sheriff for not bringing in the body was obtained on the 11th of *February*, which attachment was returnable on the 4th of *May*; and the plaintiff did not issue the attachment till the 3d of *May*, and in the mean time the defendant became bankrupt on the 19th of *March*, by which means the sheriff lost his opportunity of paying the debt and proving it under the commission; the attachment was set aside for such laches.

THE action was by original, and the special capias issued on the 21st of *January* last, returnable on the first return of *Hilary* term, and indorsed for bail 81*l.*, on which the defendant was arrested and gave a bail bond. And on the 2d of *February* notice of bail was given, and exception taken on the 3d, and a rule on the sheriff to bring in the body served on the same day, which expired on the 9th; and the bail not having justified, the rule for an attachment was obtained on the 11th *February*; but the attachment not being returnable till the first day of *Easter* term (the 4th of *May*), it was not issued till the day before. In the mean time the defendant in the action became bankrupt on the 19th of *March*, and on the 21st of *April* surrendered in discharge of his bail. Whereupon in this term *Marryat*, on behalf of the sheriff, obtained a rule nisi for setting aside the attachment, upon the ground of the delay in issuing it, whereby he was prevented, as it was sworn, from proving the debt under the commission, as he might have done if the attachment had issued before the bankruptcy.

Jervis and *Lawes* shewed cause against setting aside the attachment; and said that there was no rule of practice requiring a party to issue his writ of attachment against the sheriff immediately after it is obtained: and here the action being by original, the attachment could not be made returnable before the first return of this term; before which time it was issued. In *Rex* v. *The*

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Sheriff of Surry (a) there was a delay of several terms in issuing the attachment against the sheriff, which was afterwards set aside. In *Rex* v. *Perring* (b) the rule for the attachment was obtained on the 19th of *November*, and the attachment was not sued out till the 9th of *March* following; and the Court of C. B. held that to be too late. But the practice of the two courts differ in these cases: for in C. B., though the rule to bring in the body has expired, yet if the defendant justify his bail before the attachment against the sheriff be moved for, it is in time to prevent it (c): but in this court, if the sheriff be once in contempt for not bringing in the body, it is not purged by the defendant afterwards surrendering, though before the attachment be moved for (d).

Lord ELLENBOROUGH C. J. There is no occasion to lay down any general rule with respect to the lapse of time which shall be deemed sufficient to discharge the sheriff from the attachment in these cases; but certainly 80 days exclusive is a long time to lay by after the party is armed with the process of the court against the sheriff: and here in the mean time an important change of circumstances has taken place by the bankruptcy of the defendant. If there be no established practice of this court in such cases, there is at least a rule of right reason and justice which ought to be applied to the case before us; that if a party has a right to enforce payment of his debt against the sheriff, he must pursue it within a reasonable time, and not lay by so long as that by his laches the sheriff shall be deprived of his remedy over against the debtor. The

(a) 7 *Term Rep.* 452. (b) 3 *Bos. & Pull.* 151.
(c) *Therold* v. *Fisher*, 1 *H. Blac.* 9.
(d) *Rex* v. *Sheriff of Middlesex*, 8 *Term Rep.* 29.

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mere time which elapſed in this caſe before the attachment was ſued out does not very much fall ſhort of what occurred in *The King* v. *Perring:* there it was 109, and here it is 80 days; and here the defendant's bankruptcy has intervened.

Per Curiam, Rule abſolute.

The KING *againſt* RICHARDSON.

Friday, May 27th.

The ſtatute 32 *Geo.* 3. *c.* 58. *ſ.* 1. enabling defendants in quo warranto to plead double, is, as well as the ſtat 9 *Ann.* *c.* 20, confined to corporate officers

AN information in nature of a quo warranto having been filed againſt this defendant, to ſhew by what authority he claimed to be portreeve (*a*) of the borough of *Penryn* in *Cornwall*, he obtained a rule for pleading double: whereupon,

Burrough moved, on a former day, to diſcharge that rule; ſtating that this was a borough by preſcription, ſending members to Parliament, of which the portreeve was the returning officer, and elected at a preſcriptive court leet; but not being a corporate officer, he contended that the defendant was not within the ſtat. 9 *Ann.* *c.* 20. allowing double pleading by leave of the Court; which ſtatute had been often held, particularly in *Rex* v. *Wallis* (*b*), where all the prior caſes were conſidered, to be confined to corporate officers; and conſequently that he was not within the ſtat. 32 *Geo.* 3. *c.* 58. *ſ.* 1. which was made in pari materiâ with the former act, and merely limited the time for proſecuting ſuch informations, and muſt therefore receive the ſame conſtruction in this reſpect.

(*a*) Vi. *Rex* v. *Mein*, 3 *Term Rep.* 596. (*b*) 5 *Term Rep.* 375.

5 *The*

The Attorney-General and *Dampier* contrà, on ſhewing cauſe, endeavoured to diſtinguiſh this from the caſe of *The King* v. *Wallis*, becauſe the office in queſtion there was conſtable of *Birmingham*, which is no borough, nor ſends members to Parliament as the borough of *Penryn* does, which properly conſtitutes it a *borough*; and alſo from a late caſe of *The King* v. *Bingham*, where the double plea was diſallowed by *Lawrence* J in Court, in the caſe of the principal common law officer of *Goſport*, which is not a borough ſending members to Parliament. The words of the ſtatute of *Anne* extend as well to *offices* and *franchiſes* in *boroughs* as in *corporations*, and *portreeves* of *boroughs* are expreſsly named amongſt other officers. It is ſufficient therefore to bring the caſe within the act that the defendant, the *portreeve*, claims an *office* or *franchiſe* within a *borough*. The ſame reaſon alſo holds between corporations and boroughs ſending members to Parliament; and both were plainly within the view of the Legiſlature when they paſſed the act of the 32 *Geo.* 3. which has in ſubſtance the ſame words as the former law, and ought to be conſtrued favourably in advancement of the freedom of election and the quiet and good order of boroughs, as well as of towns corporate, both of which are named. But if a preſcriptive borough be held not to be within the meaning of the clauſe ſo far as reſpects the pleading double, neither will it be within it in reſpect of the limitation of ſix years for filing informations in nature of quo warranto againſt borough officers, which will very much abridge the benefit of the act.

Lord ELLENBOROUGH C. J. The two acts being in pari materiâ, the one following the other almoſt verbatim in this reſpect the conſtruction of the one muſt govern the

the other; and then the case of the *King* v. *Wallis* is in point, that the construction is to be confined to corporate offices.

Per Curiam, The rule for pleading double discharged.

CHAMBERS *against* DONALDSON and Others.

Friday, *May* 27th.

A feme covert living apart from her husband under sentence of separation with alimony allowed pendente lite in the ecclesiastical court, having brought trespass in the name of her husband against wrongdoers for breaking and entering her house and taking her goods, the Court refused, on the application of such defendants, to stay the action, though supported by an affidavit of the husband (who had not released the action, nor applied to be indemnified against the risk of costs) that the action was brought without his authority.

THE plaintiff's wife was living apart from him, under a sentence of separation, with alimony allowed, pendente lite, in the ecclesiastical court: and during that time the defendants broke and entered her house and took away her goods; for which an action of trespass was brought by her in her husband's name, as for breaking and entering his house and taking his goods: on which the defendants obtained a rule nisi for staying the proceedings, and making the plaintiff's attorney pay the costs, upon an affidavit, amongst others, of the husband himself, the nominal plaintiff, stating that the action had been commenced in his name without his authority: against which rule

Marryat now shewed cause, disclosing the real circumstances of the case as above stated; and observed that the plaintiff had not released the action, as he might have done, without lending his aid to the present application; but which he refrained from doing, because it would be in fraud of the decree of the ecclesiastical court, which would make him indemnify the wife for her loss by his act. Neither did he apply to this Court to be indemnified against any claim upon him for costs in case the action did not succeed; which the Court would

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of course have directed to be done, and which the plaintiff's attorney was ready to have done: and therefore he concluded that the Court would not interfere in this summary way, against the justice of the case, thereby leaving the wife without any protection against wrongdoers.

Richardson, contrà, urged that the action ought not to have been brought in the husband's name, which exposed him to the peril of costs, at least without previous application to him for that purpose, and tender of a sufficient indemnity.

Lord ELLENBOROUGH C. J. It is very evident that this application cannot be made on the part of the husband, the plaintiff on the record; for if he do not choose that the action should proceed he has a remedy in his own hand, without this application, by releasing it: and if the attorney who sued out the writ had behaved ill in so doing, the husband might have applied against him for such misconduct: or if the subject of the complaint were only that the husband was made liable to the risk of costs without his consent, we should have taken care, upon a proper application, to have secured his indemnity. But it is evident that this is an application by the defendants, colluding with the husband, to protect their own wrong, by defeating the action in the only form in which, under the unfortunate circumstances of the case, the wife can protect herself; and we will not lend our discretionary aid to the defendants to divert those legal forms, which are framed for the furtherance of justice, to the purpose of defeating it.

Per Curiam, Rule discharged.

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AMEY *against* LONG.

Saturday, May 28th.

The writ of subpœna duces tecum is of compulsory obligation on a witness to produce papers thereby demanded which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the Court, and not the witness, is to judge. And in an action against a sheriff's bailiff, for disobeying such writ, who having been subpœnaed, in a former action by the plaintiff against another, to produce the warrant under which he acted, had neglected so to do, whereby the plaintiff was nonsuited; his ability to produce the warrant and his want of just excuse for not producing it, are sufficiently alleged by stating, that he could and might in obedience to the said writ of subpœna have produced at the trial the said warrant, and that he had no lawful or reasonable excuse or impediment to the contrary.

THIS was an action on the case, in which the declaration stated that the plaintiff, in *Michaelmas* term, 47 *Geo.* 3. in the Court of *K. B.* impleaded one *K. Smith* in a plea of trespass on the case to the plaintiff's damage of 500*l*; and such proceedings were thereupon had, that afterwards, on the 2d of *December* 1806, at the sittings at Nisi Prius at *Westminster*, &c. before Lord *Ellenborough* C. J. a certain issue joined in the said plea between the plaintiff and *K. S.* in due manner was tried, &c.: and that before the trial of the said issue, viz. on the 28th of *November* 1806, the plaintiff prosecuted out of the said court his Majesty's writ of *subpœna*, directed to — *Railton*, *W. F. Hope*, *C. Long* (the defendant), and *A. Grace*; by which writ the king commanded them that they should appear in their proper persons respectively before the said *Edward* Lord *E.* &c. in his Majesty's said court at *Westminster Hall*, in the county of *Middlesex*, on *Tuesday* then next, viz. on the 2d of *December* 1806, &c.: *And that they the said C. Long and A. Grace, or one of them, should produce and shew forth at the time and place aforesaid, a certain warrant granted to them or one of them by the Sheriff of Surry*, upon a certain writ of non omittas testatum fieri facias issued out and under the seal of the said Court, &c. on or about the 13th of *May* then last, between the plaintiff and *S. Glover*, defendant, *and the paper writing or instructions which accompanied the same warrant*; and then and there to testify and shew all and singular those things which they knew, or the said warrant, papers, &c. might

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import, of and concerning the faid action between the plaintiff and *K. Smith*, &c.: which faid writ the plaintiff afterwards, and before the trial of the faid iffue, viz. on the 1ft of *December* 1806, at *Weftminfter*, &c. caufed to be made known and fhewn to the defendant, and a copy thereof to be left with him, and then and there paid him 1*s*., being a reafonable fum for his cofts and charges in attending as a witnefs, according to the tenor of the faid writ of fubpœna. And although the defendant, *in part obedience* of the faid writ of fubpœna, did afterwards, on the 2d *December* 1806, at *W.* &c. appear as a witnefs on the trial of the faid iffue; and although the defendant *could and might*, in obedience of the faid fubpœna, *have produced and fhewn forth at the time and place aforefaid on the faid trial of the faid iffue the faid warrant* fo mentioned and referred to in the faid writ of fubpœna, as aforefaid, and thereby fo required to be produced and fhewn forth as aforefaid; and although the production and fhewing forth of the faid warrant was *material evidence* for the plaintiff on the faid trial, and would have enabled the plaintiff to have obtained a verdict on the faid iffue againft the faid *K. S.* at *W.* &c. whereof the defendant there had notice; yet the defendant not regarding his duty in that behalf, but wrongfully and unjuftly intending to injure the plaintiff, and to deprive her of the benefit of the fame evidence on the trial of the faid iffue, and thereby to prevent her from obtaining a verdict againft the faid *K. S.* thereon, and to put her to expence, &c. *did not nor would* at the time and place aforefaid, on the faid trial of the faid iffue, *produce or fhew forth the faid warrant*, or the faid paper writing or inftructions fo mentioned and referred to in the faid writ of fubpœna as aforefaid; although the defendant was then

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and there solemnly called upon by the said Court for that purpose, *and had no lawful or reasonable excuse or impediment to the contrary;* but then and there wholly neglected and refused so to do: and by reason thereof the plaintiff was nonsuited in the said action; and such proceedings were thereupon had in the said action, that afterwards, in *Hil.* 47 *Geo.* 3. the said *K. S.* recovered against the plaintiff 52*l.* 10*s.* for his costs and charges about his defence in that behalf, as by the record, &c. more fully appears. By reason of which said several premises the plaintiff was not only obliged to pay and did pay to the said *K. S.* the said sum of 52*l.* 10*s.* but was hindered and delayed in the recovery of her damages in the plea aforesaid, and was obliged to lay out 200*l.* more in and about the prosecution of the said action, &c. There was another count in substance the same. To which the defendant pleaded not guilty; and the plaintiff obtained a verdict.

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A motion was made in last *Hilary* term to arrest the judgment in this case, on two grounds; 1st, that it was not sufficiently alleged in the declaration, that the defendant had it in his power to produce the warrant which the writ of subpœna duces tecum required him and another person to whom it was directed, or one of them, to produce at the trial. 2dly, That that which is commonly called a writ of subpœna duces tecum is not of compulsory obligation in the law. The case was argued at length by *Park*, *Marryat*, and *Pell*, on shewing cause against the rule for arresting the judgment; and by *The Attorney-General*, and *Garrow*, in support of it.

Against the rule it was urged, on the first ground of objection, that after verdict it was to be presumed that every material allegation in the declaration, necessary to support the gravamen of the complaint, was proved;

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and consequently it must be taken that the defendant *could and might have produced at the trial the warrant* mentioned in the subpœna duces tecum. For if it had appeared to the Court and jury that he had it not in his possession or control (not having voluntarily parted with it in fraud of the subpœna), and consequently could not in fact have produced it, but by the consent of others, over whose acts he had no control, the plaintiff could not have recovered a verdict upon that allegation. And this presumption arises more strongly from the subsequent allegation, that the defendant *had no lawful or reasonable excuse or impediment to the contrary*, which let him in to shew, if he had, any reasonable excuse for not having ready to produce at the trial the warrant which was once in his possession, and was his authority for what he did by the sheriff's command. Upon this head of presumptions after verdict, they referred principally to *Macmurdo* v. *Smith*, 7 *Term Rep.* 518., *Bull. Ni. Pri.* 320. and 1 *Saund.* 228. note 1. by Serjt. *Williams*, which collects all the cases. As to the second and principal point, they contended that the writ of subpœna duces tecum was known to have been in general use for a considerable period past. It is to be found in *Clerk's Manual*, 31. which was published in 1678, in the *Thesaurus Brevium*, 304. and *Officina Brev.* 385., amongst other forms of acknowledged writs. The precedents of the common subpœna ad testificandum are scarcely more ancient than those of the subpœna duces tecum. This writ is of essential importance to the due administration of justice; oftentimes as much so as the common writ of subpœna to compel the attendance of witnesses: for where a matter depends upon written evidence in the possession of another than the party in the cause who is interested in its production, it would be

 nugatory

nugatory to enforce his personal attendance, without the document by which the truth of the fact in issue can alone be proved. And as the obligation of a witness to answer by parol does not depend upon his own judgment, but on that of the Court, the same rule must prevail with respect to his production of documentary evidence. The witness is bound at all events to bring with him the paper which he has been subpoenaed to produce; and when it is in Court he may then state any legal or reasonable excuse for withholding it, of which the Court will judge. In this respect there can be no distinction in principle between parol and written evidence. Proof of either kind, if within the knowledge or possession of the witness, ought to be produced, if legal; and of its legality the Court and not the witness must judge. This writ is also to be found in all modern books of entries and practice: it is spoken of by Mr. Justice *Blackstone* (3 *Com.* 382.) as a writ well known in the law. And though the general power of compelling a witness to produce every document in his possession was denied by Lord *Kenyon* in *Miles* v. *Dawson* (*a*), and *Bateson* v. *Hartsink* (*b*); and he protected the witnesses there in withholding certain documents which went to affect the interests of third persons; yet those were mere exceptions to the general rule,

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(*a*) 1 *Esp. Ni. Pri. Cas.* 405. The case was thus stated by one of the defendant's counsel who was engaged in it. It was an action of trespass for taking the plaintiff's ship; and he called a witness to prove the taking, who it was alleged had done it under a letter of attorney from the defendant; which letter the witness had in his hands when called; but objected to produce it, though served with a subpoena duces tecum: and Lord *Kenyon* held that he was not obliged to produce it: in consequence of which the plaintiff was obliged to prove the fact of the taking by the defendant's authority in another way.

(*b*) 4 *Esp. N. P. Cas.* 43.

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ftanding on the fame footing as the practice of the courts of equity, in refufing to compel a party to difclofe his title; and as the practice of the courts of law in refufing to compel a witnefs to give evidence which tends to criminate himfelf, or to difclofe matters communicated to him confidentially in the character of counfel or attorney. And in *Leeds* v. *Cook* (*a*), where a witnefs had been ferved by the defendant with a fubpœna duces tecum to produce a letter written to her by the plaintiff, which it appeared fhe had afterwards given up to him at his requeft; Lord *Ellenborough* let in parol evidence of its contents. Then fuppofing this writ to be of binding force like a common fubpœna, they referred to *Wakefield's* cafe (*b*), and to *Pearfon* v. *Iles* (*c*), recognizing that a remedy by action lay at the common law for the default of the witnefs.

On the part of the defendant it was objected, firft, that the declaration did not ftate any fact to fhew that he, the witnefs in the former action, had the power of producing the warrant at the trial: it is not alleged that he had poffeffion of it at the time of the fervice on him of the fubpœna duces tecum, and alfo at the time of the trial; or that having it in the firft inftance, he might have held it till called to produce it; which would have fhewn that he had, or might, but for his own default, have had it to produce then. It is not even ftated that he was at any time *poffeffed* of, or *entitled* to the poffeffion of it: but the general allegations of the declaration would be anfwered by proof that another perfon, who had the warrant, had told the defendant that he would let him have it to produce, and that fuch perfon was ready to have

(*a*) 4 *Efp. N. P. Caf.* 256. (*b*) *Rep. temp Hardw.* 313. (*c*) *Dougl.* 556.

delivered

delivered it to him on requeſt. On the general point, they argued that the obligation to obey ſuch a ſubpœna, if legal, muſt always have exiſted, and been in general uſe: and, if ſo, it was ſingular that ſo few precedents, and thoſe comparatively in modern times, could be ſhewn; that each ſhould be directed to ſeveral perſons, and for the production of public documents, ſuch as pariſh regiſters. From thence they inferred that the writ of ſubpœna duces tecum only lay to public officers for the production of the public documents in their cuſtody, in which all perſons had or might have an intereſt; and could not properly be extended to private perſons, to compel them to produce papers belonging to them individually, or which might happen to be in their cuſtody. The inconvenience to ſome individuals of compelling ſuch diſcloſures will more than counterbalance any convenience to others. This is notorious, and admitted, with reſpect to title deeds and the like; and it applies in different degrees to other private papers. The owner of ſuch papers, of a letter, for example, may not be able preciſely to ſhew what detriment may enſue to him from the diſcloſure of its contents, and yet they may be ſuch, concerning himſelf, his family, or friends, which he might juſtly diſlike to publiſh. And if the plaintiff in the action have a right to read part of it in evidence, the defendant muſt neceſſarily have an equal right to have the remainder read, in order to be aſſured that it does not qualify or vary the ſenſe of what was deemed material by the other. Then how can the materiality of any part of a paper which is demanded to be produced in evidence be aſcertained, except by the peruſal of it, if not by the party calling for it, at leaſt by the Judge preſiding at the trial; which may let in all the inconvenience to be ap-

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prehended, although ultimately it should turn out that there was a sufficient reason for withholding it, either as not applicable to the issue between the parties, or as the production of it would be injurious to the legal interests of the witness. But further, when this subject was before the Legislature in the time of Queen *Elizabeth*, and when a remedy was given by the stat. 5 *Eliz. c.* 9. *s.* 12. for the non-attendance of witnesses upon whom process was served to testify, it is incredible that a like recompence should not have been given in case of the non-production of writings, as well as for the non-appearance of the witnesses themselves, if it had been then considered that they were bound to produce any documents which the parties in a suit might think proper to call for. It is admitted, however, that the remedy of the party grieved by the default of a witness, in not appearing when served with a common subpœna, does not rest on this statute, but that there are many precedents of declarations in such actions at common law: but that only points the argument more strongly against the extension of the remedy to the case in question, of a witness appearing but not producing a paper which he was demanded by a subpœna to produce, of which not one precedent either ancient or modern has been shewn. They also relied on the opinion of Lord *Kenyon* in the cases before cited against the right to compel a witness to produce papers.

In addition to these arguments, it was stated to have been the opinion of some eminent men at the bar, now deceased, and of others who had sat on the bench, that a witness was not bound to produce papers belonging to him by virtue of a subpœna duces tecum, served on him at the suit of third persons; and that instances had occurred of witnesses having been advised in open court

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by the counſel of the adverſe party in the cauſe not to produce the papers called for; though the production of them was not objected to on any ſpecial ground. But Lord *Ellenborough* and Mr. Juſtice *Lawrence* declared that they had never known of any ſuch inſtances in their own time. And the latter ſaid that this was one of the greateſt queſtions he had ever heard agitated in *Weſtminſter Hall*; one which moſt deeply affected the adminiſtration of juſtice, both civil and criminal. That he could not reconcile it to his mind to ſuppoſe, that the innocence of a perſon accuſed might depend on the production of a certain document in the poſſeſſion of another, who had no intereſt in withholding it, and yet that there ſhould be no proceſs in the country which could compel him to produce it in evidence. Lord *Ellenborough* ſaid, that ſince the exiſtence of the courts of law there muſt have been ſome method of compelling the production of written evidence, and they were not aware of any other method than by the writ of ſubpœna duces tecum. That the queſtion being of very general and public concern, and as Lord *Kenyon* appeared to have once intimated great doubt at leaſt of the efficacy of ſuch a writ; and as the queſtion was upon the record, and the ultimate deciſion of it would give the rule in future; the Court would give the caſe the moſt profound conſideration, and deliver their opinion at another time. The caſe accordingly ſtood over from *Hilary* term to this day, when

Lord ELLENBOROUGH C. J. delivered the unanimous opinion of the Court.

The judgment in this caſe was moved to be arreſted on two grounds; firſt, that it was not alleged in the declaration with ſufficient certainty, that the defendant *had it in his*

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his power to do the thing which the writ of ſubpœna duces tecum required him and one *Grace*, or one of them, to do; viz. to produce the ſheriff's warrant upon a teſtatum fieri facias to them, or one of them, directed. Secondly, That the ſuppoſed writ of ſubpœna duces tecum mentioned in the declaration was not a writ known to the law, nor had any ſuch compulſory force and obligation attached to it as the declaration ſuppoſes. As to the firſt of theſe objections, and which applies to both counts of the declaration equally, it appears to us that the allegation "that the defendant *could and might* in obedience "to the ſaid ſubpœna have produced and ſhewn forth at "the time and place aforeſaid at the ſaid trial of the "ſaid iſſue the ſaid warrant mentioned and referred to "in the writ of ſubpœna," in the plain, natural, and obvious ſenſe of theſe words imports an immediate phyſical ability to do the thing required to be done on the part of the defendant; *i. e.*, that the defendant was able, by having the warrant in his own poſſeſſion, to have produced it: and not that by application to others who had the cuſtody of it he *could and might* have acquired the means, and indirectly have become the inſtrument, of producing it. The latter ſenſe of the words is indeed ſo remote from the ordinary underſtanding of mankind on ſuch a ſubject, and has ſo little reference to the duty ſought to be enforced, viz. the production of that by the witneſs which the witneſs could, in obedience to the ſubpœna, perſonally produce; that, after verdict, it is not to be intended that the Judge at the trial received proof of the words in this ſtrained and unnatural ſenſe of them. And when it is afterwards ſaid in the count that the defendant did not, *nor would*, at the time and place of trial produce the warrant, although ſolemnly

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called upon by the Court for that purpose; "*and although* "*he had no lawful or reasonable excuse or impediment to the* "*contrary*;" it certainly excludes the case of the warrant being in the possession of another; and on that account attainable only through the means or by the delivery of such other person; inasmuch as the existence of such circumstances, if they had in fact existed, would have afforded "a lawful and reasonable excuse and impediment to the contrary;" and of course have falsified the allegation upon which the blame of non-production is rested: no man being obliged, according to any sense of the effect of such a subpoena, to sue and labour in order to obtain the possession of any instrument from another for the purpose of its production afterwards by himself, in obedience to the subpoena. We are of opinion, therefore, that there is no ground for arresting the judgment upon this first objection.

As to the second, and most material objection, viz. that a subpoena duces tecum is not a writ of compulsory obligation and effect in the law; it has been principally maintained in argument, on the part of the defendant, on the ground, that no such writ is to be found in the *Registrum Brevium*, nor any where else prior to the time of *Car.* 2. when the instances to be found in *Clerk's Manual*, 31. *Thesaurus Brevium*, 304. and *Officina Brevium*, 385. first occur. But when it is recollected that the *Registrum Brevium* does not even contain the common writ of subpoena ad testificandum, the antiquity and compulsory effect of which is not disputed, [His Lordship here referred to *Pearson* v. *Iles*, *Dougl.* 556. 561. where it is laid down by Lord *Mansfield*, that the Courts of *Westminster Hall* proceeded against witnesses who wilfully absented themselves, as for a contempt, before the stat.

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5 *Eliz. c.* 9.: and that ſtatute refers to proceſs out of courts of record to teſtify concerning matters depending in thoſe courts, as proceſs then known and in uſe;] the obſervation ariſing from the omiſſion of the writ in queſtion becomes leſs important. And indeed there are a multitude of writs, in daily uſe and of unqueſtioned legal validity and effect, which are not inſerted in that collection. One need not go further for an inſtance than the very writ of non omittas fieri facias, mentioned in this ſame declaration. The right to reſort to means competent to compel the production of written, as well as oral, teſtimony ſeems eſſential to the very exiſtence and conſtitution of a court of common law, which receives and acts upon both deſcriptions of evidence, and could not poſſibly proceed with due effect without them. And it is not poſſible to conceive that ſuch courts ſhould have immemorially continued to act upon both, without great and notorious impediments having occurred, if they had been furniſhed with no better means of obtaining written evidence than what the immediate cuſtody and poſſeſſion of the party who was intereſted in the production of it, or the voluntary favour of thoſe in whoſe cuſtody the required inſtruments might happen to be, afforded. The courts of common law, therefore, in order to adminiſter the juſtice they have been in the habit of doing for ſo many centuries, muſt have employed the ſame or ſimilar means to thoſe which we find them to have in fact uſed from the time of *Charles* the Second at leaſt, according to the entries before referred to; unleſs indeed it is to be inferred from the circumſtance of thoſe particular entries being found to reſpect books and papers in the cuſtody of rectors, vicars, and churchwardens, that the compulſory power of the Court related only to books and papers of that deſcription, and producible only by ſuch perſons,

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and upon a queſtion of nonage merely; a ſuppoſition to which we can by no means accede. They may be taken therefore as known and recorded ſpecial inſtances of a general practice to compel by writ the production of neceſſary written teſtimony at the trial of ſuits at law. In the caſe of *The King* v. *Dixon*, 3 *Burr.* 1687. it was held by Lord *Mansfield* and the reſt of the Court, that an attorney who had been ſerved with a ſubpœna duces tecum out of the Crown office, to produce certain vouchers which his client, a Mr. *Peach*, had exhibited and relied upon before a Maſter in Chancery, and which ſubpœna had been ſerved upon the attorney, in order to found a proſecution for forgery againſt his client, was not bound to produce thoſe required vouchers. In that caſe no objection was taken to the *writ*, but to the ſpecial circumſtances under which the party poſſeſſed the papers; ſo that the Court may be conſidered as recognizing the general obligation to obey writs of that deſcription in other caſes. Indeed the niſi prius caſe of *Miles* v. *Dawſon*, 1 *Eſp. N. P. Caſ.* 405. in which Lord *Kenyon* refuſed to compel a witneſs to produce a power of attorney in his poſſeſſion, eſtabliſhes in principle nothing more than this, that there are circumſtances in reſpect of which the production of an inſtrument, required in the terms of a ſubpœna, would not be enforced by the authority of the Court; which is a propoſition too clear to be doubted. And, to be ſure, though it will be always prudent and proper for a witneſs, ſerved with ſuch a ſubpœna, to be prepared to produce the ſpecified papers and inſtruments at the trial, if it be at all likely that the Judge will deem ſuch production fit to be there inſiſted upon; yet it is in every inſtance a queſtion for the conſideration of the Judge

Judge at nisi prius, whether, upon the principles of reason and equity, such production should be required by him, and of the Court afterwards, whether, having been there withheld, the party should be punished by attachment. I have not thought it necessary to advert to certain extrajudicial opinions, supposed to have been entertained and expressed by several eminent lawyers on this subject, as they afford no safe basis for judicial determination, and are contradicted by the actual practice and experience of courts of law during the period already alluded to, as well as opposed by the convenience and necessity of common law trials, which must have at all times required, and may therefore be presumed to have had, the use of some such means as the writ in question, to conduct them to any useful and effectual termination. Upon the whole, therefore, as to the general question, whether a writ of subpoena duces tecum be a writ of compulsory obligation and effect in the law; we are of opinion that it is: and, therefore, that neither upon this second ground, any more than upon the former, ought this judgment to be arrested.

Rule discharged.

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ROBERTSON and Another, Assignees of MILBURN, HALLOWELL, and WALMSLEY, Bankrupts, *against* Sir THOS. HENRY LIDDELL Bart.

Saturday, May 28th.

The departure of a trader from his dwelling-house, *with intent* to delay his creditors, is an act of bankruptcy, though no creditor be *thereby* in fact delayed. And the words in the stat. 1 *Jac.* 1. *c.* 15. *s.* 2. following this and other acts of bankruptcy committed, viz. "to the intent "or *whereby* his "creditors *shall* "or *may* be de- "feated or de- "layed," &c. are to be read "to the intent "his creditors "*shall*, or "whereby, (or "that thereby) "they *may* be "defeated," &c. But the lying in prison six months upon an arrest is made a substantive act of bankruptcy independant of any intent of the trader.

So in the case of an act of bankruptcy by the trader's *beginning to keep house*, the denial of a creditor is usually given in evidence, not to shew the fact of the creditor's being delayed, but as evidence to explain the equivocal act of the trader's keeping in his house, and to shew that he *began to keep house with intent* to delay his creditors.

IN trover, the following case was made for the opinion of this Court, which was tried before *Chambre* J. at the assizes for *Northumberland* in 1805.

The action was brought against the late sheriff of *Northumberland* to recover the value of household furniture belonging to the bankrupt *Milburn*, sold by the sheriff under an execution at the suit of *Newnham* and Co. upon a judgment obtained after the supposed act of bankruptcy and the actual assignment to the plaintiffs. *Milburn, Hallowell*, and *Walmsley*, were copartners in the business of ship-building at *North Shields*, in the county of *Northumberland*; and *Milburn, Hallowell*, and one *Humble* were also partners in a brewery at the same place. In *August* 1803 their partnership concerns became much deranged, and on the 6th of *December* following *Milburn, Hallowell*, and *Walmsley*, (the two former having been arrested about three weeks before) left *North Shields* from an apprehension of being arrested by *Brown* and *Dixon* of *Newcastle*, and other creditors. They left home together, and crossed over the river *Tyne* to *South Shields*, in the county of *Durham*, in order to get out of *Northumberland*, and came up to *Gateshead*, in the county of *Durham*. Whilst they were at *Gateshead* they sent for Mr. *Bainbridge*, an attorney of *Newcastle*, who went to *Gateshead*, and found all the three parties there together. They then

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informed him that they had left their homes for fear of being arrefted, and they faid that they croffed the water at *South Shields* in order to get out of the county of *Northumberland* as foon as they could, and had come up on the fouth fide in the county of *Durham*, and that they were on their road to *Gillfland* in *Cumberland*. *Bainbridge* told them that he was afraid their proceedings would end in a commiffion of bankrupt, and wifhed them to go back to *North Shields*. *Walmfley* did in fact return thither either on that or the following day; and *Bainbridge* told him to be extremely circumfpect in what way he acted: but *Millburn* and *Hallowell* proceeded to *Gillfland*. Several creditors of *Millburn*, *Hallowell*, and *Walmfley*, called for payment of their debts (*a*) during the abfence of *Millburn* and *Hallowell*; but it did not appear whether they fo called during the abfence of *Walmfley*, in manner and for the purpofe aforefaid, or after *Walmfley*'s return to *North Shields* from *Gatefhead*. A joint commiffion of bankrupt was iffued againft *Millburn*, *Hallowell*, and *Walmfley*; upon which they were declared bankrupts, and the plaintiffs were duly chofen affignees. The queftion was, Whether an act of bankruptcy had or had not been committed by *Millburn*, *Hallowell*, and *Walmfley*.

The only queftion argued was, Whether *Walmfley*'s having departed from his dwelling-houfe *with intent* to delay his creditors, but *no creditor* having been *in fact delayed* by fuch his departure and before his return home, conftituted an act of bankruptcy? The affirmative of the queftion was argued by *Carr* for the plaintiffs; and the negative by *Hullock* for the defendant. The argument turned upon the critical meaning of the words of

(*a*) It was admitted that they were not paid.

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the ſtat. 1 *Jac.* 1. *c.* 15. *ſ.* 2. as preceded and explained by the ſtat. 13 *Eliz.* *c.* 7. *ſ.* 1. made in pari materiâ, and upon the conſtruction which theſe ſtatutes had received in different caſes. The gist and force of the argument was afterwards fully ſtated by Lord *Ellenborough* in delivering the judgment of the Court on a ſubſequent day in the term, and therefore it will be ſufficient to ſtate the ſeveral proviſions of the two ſtatutes, and the caſes which were referred to and commented upon.

By ſtat. 13 *Eliz.* *c.* 7. *ſ.* 1. "if any merchant, &c. "ſhall depart the realm, or begin to keep his houſe, or "otherwiſe to abſent himſelf, or take ſanctuary; or "ſuffer himſelf willingly to be arreſted for any debt, "&c.; or ſuffer himſelf to be outlawed; or yield him-"ſelf to priſon; or *depart from his dwelling-houſe* or "houſes, *to the intent* OR *purpoſe* to defraud or hinder "any of his creditors of their juſt debt," &c.; he ſhall be deemed a bankrupt. Then the ſtat. 1 *Jac.* 1. *c.* 15. intituled "An act for the better relief of the creditors," &c. reciting, amongſt other defects, that "the deſcription of a bankrupt in former ſtatutes is not ſo fully expreſſed" as is meet, enacts, by *ſ.* 2. "that every perſon "uſing the trade of merchandize, &c. who ſhall depart "the realm; or begin to keep his houſe, or otherwiſe "to abſent himſelf, or take ſanctuary; or ſuffer himſelf "willingly to be arreſted for any debt, &c.; or ſuffer "himſelf to be outlawed; or yield himſelf to priſon (*a*); "or willingly or fraudulently procure himſelf to be ar-"reſted, or his goods, money, or chattels, to be at-"tached or ſequeſtered; or depart from his dwelling-"houſe; or make or cauſe to be made any fraudulent

(*a*) So far following the former ſtatute.

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" grant or conveyance of his lands, goods, &c., *to the* " *intent* OR *whereby* his creditors *shall* or *may* be defeated " or delayed for the recovery of their just and true " debts; or being arrested for debt shall after his arrest " lie in prison six months or more upon that arrest, or " upon any other arrest, &c. shall be adjudged a bank-" rupt." The authorities cited and commented upon by *Carr* were 1 *Com. Dig.* 523. *Bankrupt*, C. 1. 1 *Bac. Abr.* 383. *Bankrupt*, A. *Colkett* v. *Freeman*, 2 *Term Rep.* 59. (*a*). *Heylor* v. *Hall*, *Palm.* 325. *Dickinson* v. *Foord*, *Barnes*, 160. *Phillips and Peake* v. *The Sheriff of Essex*, before *Eyre* C. J. *Green*, 52. and 2 *Montague*, 158. *Aldridge* v. *Ireland*, *E.* 34 *Geo.* 3. cited 7 *Term Rep.* 512. and *Fowler* v. *Pagett*, ib. 509. and *Hawkins* v. *Lukin*, *T.* 36 *G.* 3. ib. 516. *Barnard* v. *Vaughan*, 8 *Term Rep.* 149. explained in *Wilson* v. *Norman*, *Cullen*, 34. and 1 *Esp. N. P. Cas.* 334. *Assignees of Miller* v. *Turner*, *Montague* 167. *Adey and Others, Assignees of Parker*, v.—Sittings at *Westminster*, *M.* 41 *Geo.* 3. ib. There Lord *Kenyon* C. J. said (MS.) that the real ground of decision in *Barnard* v. *Vaughan* was that Mrs. *Barnard* left her dwelling-house to avoid the inconvenience of being there with the sheriff's execution, and not to avoid her creditors. *Hornsby and Others, Assignees of Needham*, v. *Neville*, *York Lent Assizes* 1801, when *Chambre* J. held that the trader leaving his house with intent to delay his creditors, though none were actually delayed, was an act of bankruptcy. The same opinion by Lord *Eldon*, in *Wolf* v. *Horn*, in Chancery, *T.* 44 *G.* 3. and *Hammond and Others, Assignees of Gadsden*, v. *Hincks*, *T.* 44 *G.* 3. 5 *Esp. N. P. Cas.* 139.

(*a*) This was only cited to shew, that if *Walmsley* committed an act of bankruptcy by departing from his dwelling-house with intent to delay his creditors, his return home again could not purge the act of bankruptcy; which was admitted at once by the Court.

S. P.

S. P. *Garret* v. *Moule*, 5 *Term Rep.* 575. *King* v. *Bebb*, Excheq. *Hil.* 46 *G.* 3. and *Dudley* v. *Vaughan*, Sittings at *Guildhall* after last *Easter* term, before Lord *Ellenborough* C. J. who ruled that a trader beginning to keep house with intent to delay his creditors was sufficient to constitute an act of bankruptcy, though he were only denied to be seen, but not denied to be at home. In addition to these *Hullock* mentioned another nisi prius case before *Chambre* J. where the result was different from that in *Hornsby* v. *Neville*; also *Jackman* v. *Nightingale*, *E.* 13 *G.* 2. per *Lee* C. J. at *Guildhall*, *Bull. N. P.* 40.; *Hawkes* v. *Saunders*, *T.* 24 *G.* 3. *Cooke's Bank. Laws*, 4th edit. 74: *Judine* v. *Da Cossen*, 1 *New Rep.* 234.; and *Ex parte Cockshot*, 3 *Bro. Ch. Cas.* 504.

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Lord ELLENBOROUGH C. J. now delivered judgment. —After stating the case—The validity of this joint commission of bankrupt against the three partners depends upon the question, Whether *Walmsley*, one of them, duly became a bankrupt under the circumstances stated: for, respecting the bankruptcy of the other two, *Millburn* and *Hallowell*, no question has been ever raised. Whether *Walmsley* became a bankrupt depends upon this point, Whether a departure from his dwelling house, by a trader, *with intent* to delay his creditors, be a sufficient act of bankruptcy, within the meaning of the stat. 1 *Jac.* 1. *c.* 15. *s.* 2., although no creditor should have been *thereby* in fact *defeated or delayed* for the recovery of his debt. This fact of departing from the dwelling-house by a trader is one of several indications of insolvency, constituted and declared to be acts of bankruptcy by stat. 13 *Eliz.* *c.* 7. when accompanied with the *intent* OR *purpose* to defraud or hinder any of his creditors, &c. It will be

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observed that upon the language of this statute the act is complete by being done with the *intent* specified; the words, "*or purpose*," being merely additional words to the same effect, and which carry the sense no further than it was carried before by the preceding word *intent*. The stat. 1 *Jac.* 1. *c.* 15. introduces three new specific acts of bankruptcy, in addition to those specified in the stat. 13 *Eliz.*: two of which, together with all the other acts of bankruptcy enumerated in the stat. 13 *Eliz.*, precede and are governed by their relation to these words which follow them; viz. "*to the intent*, OR *whereby* his or their "creditors shall or may be defeated or delayed," &c. The third new act of bankruptcy in the stat. 1 *Jac.* 1. viz. the lying in prison six months upon an arrest, is made a substantive act of bankruptcy, independent of any *intent* of the party, not being in the context connected therewith. These words, "*to the intent* OR *whereby*," literally taken in their disjunctive sense, may be thought to import that a *beginning to keep house*, and a *departing from the dwelling-house* (and any other of the acts specified) are acts of bankruptcy, whether they be done with an intent to delay, or be merely productive of that effect, however innocently and unintentionally they may have happened to produce it. Upon this construction of the words "*or whereby*," a temporary retirement and privacy, by staying in a man's own house, to the exclusion of strangers, during the hours of sleep, or refreshment, or during a period of sickness, or domestic affliction, might be an act of bankruptcy, as "a beginning to keep house;" in the same manner as going abroad for the purpose of exercise, business, or entertainment, might also be, as a departing from the dwelling-house; if during any of those periods a creditor called in vain for his debt. It hardly needs

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argument to prove that such could not have been the intention of the Legislature: and if it could not, the words "*or whereby*," must either be rejected, or understood in some other sense. A cure for this difficulty was sought in the case of *Fowler* v. *Pagett*, 7 *Term Rep.* 509. where a creditor had left his dwelling-house for a short time in order to seek and secure the means of satisfying his creditors, and with no purpose of delaying them, but who had in fact by his absence occasioned a delay to some of them, who had called for payment whilst he was from home. Lord *Kenyon* in that case thought that "by reading the word "*and*" for "*or*" in the stat. 1 *Jac.* 1. *c.* 15. "as was frequently done in the construction of legal "instruments where the sense requires it, all difficulty "would be got over." And indeed the difficulty of the particular case was thereby disposed of; for as no intention of delay existed on the part of the trader who departed from his dwelling-house, both the circumstances, which a copulative construction of the words required, (if that were the necessary construction) could not take effect in that case; and if the intent of the departure be alone considered as material, still that case will at any rate have been well decided; although the mode of solving the difficulty which was resorted to on that occasion may not be satisfactory. The objection to this construction, which requires that both the intent and the consequence of delay should concur, in order to constitute the act of bankruptcy, is that the bankruptcy is made to depend not merely on the acts and intents of the bankrupt himself, however clear and unequivocal they may be; but upon the fortuitous coincidence of the acts of other persons; and which acts (in the instance particularly of a departure from the dwelling-house) are less likely to

concur in the proportion in which that departure is most notorious. For when the flight of an insolvent trader from his house of trade is universally known, it is not likely that any creditors, by uselessly calling for payment of their debts at such a time, should furnish the ordinary proof of delay, which arises from the non-payment of creditors so calling. If the consequence of actual delay be necessary to perfect every one of the several acts of bankruptcy in the stat. 1 *Jac.* 1. *c.* 15. which precede the words "*to the intent or whereby*," &c., it must be necessary to perfect the act of *making a fraudulent conveyance*, which is one of them; but inasmuch as a fraudulent conveyance, shewn to be such, cannot in law have the effect of defeating or delaying a creditor; unless *the making* such a conveyance be an act of bankruptcy, consummated by the intent with which it is made, it can never become more an act of bankruptcy by any thing which may happen in respect to it afterwards. And indeed it has never been held necessary, in proof of this act of bankruptcy, to do more than to prove the execution of the deed, under such circumstances as rendered it a fraudulent one in respect of creditors; without going on to shew that any creditor had been in fact ever delayed or defeated thereby. Indeed the fact of delay in the case of beginning to keep house is usually resorted to *in evidence* for the mere purpose of explaining an act which might otherwise be equivocal: and the denial to a creditor is there given in evidence to shew that the party has *begun* to keep house: and it is from mistaking the intended effect of this evidence, as given to prove actual delay, that proof of actual delay can be required where the act of bankruptcy is by departing from his dwelling-house. If these and other inconveniences which might be shewn,

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arise from construing the word *or* for *and*, in this part of the statute, it is material to consider, whether some other cure in point of construction cannot be applied to these words, and whether the words which follow the word *intent*, i. e. "*or whereby*," may not by a small change in them be rendered susceptible of another sense, more consistent with the meaning of the original sentence as it occurs in the stat. 13 of *Eliz.*, and more agreeable to the general scope and object of the bankrupt laws. If, instead of "*or whereby*" the sentence should be read, "*or that thereby*" or "*that*," (omitting the word *whereby*) the original sense of the word *purpose* in the stat. 13 *Eliz.* is restored; and inasmuch as it would neither extend or narrow the meaning of the immediately foregoing word *intent*, it would leave to that word its full operation and effect, without engrafting upon it any of the inconveniences already observed upon as resulting from the copulative construction suggested in the case of *Fowler* v. *Padgett*. Another mode of considering the words "*to the intent*" "*or whereby*," as meaning the same thing, is this; by referring the former to the word *shall*, and the latter to the word *may*; i. e. *to the intent* that the creditors *shall* be defeated, or *whereby* they *may* be so. This gives the words the same effect as *intent or purpose* in the statute of *Eliz.*, and prevents *this* act from operating in restriction of *that*, which it otherwise would do, and which, as may be collected from the title, which is for the better relief of creditors, could not have been intended. It would be a superfluous waste of time to advert to all the various cases which have been cited in argument. The latest of them is that of *Hammond and Others, Assignees of Gadsden a Bankrupt*, v. *Hincks*, which, having been tried at Nisi Prius before the present Chief Justice of the Common

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ROBERTSON *against* LIDDELL.

Pleas, came before that Court upon a motion for a new trial, as reported in 5 *Esp.* 141. In that case the Chief Justice is reported to have laid down at Nisi Prius, and the Court of Common Pleas, in refusing to make the rule absolute, must be taken to have agreed with him, that evidence of the actual delay of a creditor, by the bankrupt's leaving his house to avoid his creditors, was not necessary to constitute an act of bankruptcy. As far as we are able to collect what was the opinion of the Court of Exchequer upon that subject from the statement made to us of what passed in that court, upon the motion for a new trial, in *King* v. *Bebb*, upon *Castell* and *Powell's* bankruptcy, we cannot but suppose that it inclined the same way with that of the Common Pleas in the case of *Hammond* v. *Hincks*. Upon the authority therefore of these later cases, in which all the former ones were, as we understand, considered; as indeed they have been by us upon the present argument; upon the sound construction of the statute 1 *Jac.* 1. *c.* 15, explained by the antecedent statute of 13 *Eliz.*, made in pari materiâ, and almost in iisdem terminis with the other, excepting only what appears to have been a casual and unintended variation in the phrase of a particular sentence; as well as upon the reason and convenience of the thing; we are of opinion that *Walmsley*, in leaving home with intent to delay his creditors, committed an act of bankruptcy, although no creditors were thereby in fact delayed; and that therefore the postea should be delivered to the plaintiffs.

Judgment for the Plaintiffs.

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BLANCHARD *against* LILLY and Others.
The KING *against* BLANCHARD.

Saturday, May 28th.

An award that certain actions be *discontinued*, and each party pay his own costs, is final and good, being in effect an award of a stet processus.

THE above cause and prosecution for a misdeameanor arising out of the same transaction, as well as other causes, were referred to an arbitrator, under a rule of reference of *all* matters in difference between the parties; and the arbitrator awarded "in favour of the defendants in the first mentioned cause;" and as to the indictment, "that the verdict of acquittal should stand;" and further, "that each of the parties in the said causes should pay his or their own costs, and also their costs of the reference." Then reciting that two other causes were depending, one of *Edwards* v. *Blanchard*, and another of *Blanchard* v. *Edwards*; he awarded each to pay his own costs, and also his own costs of the reference, "*and that the said actions be discontinued.*"

Espinasse, on a former day, had obtained a rule nisi for setting aside the award, on the ground that an award *to discontinue an action* was bad, because it did not make a final end of the matter in difference; for it did not prohibit any new action to be brought: and he cited *Tipping* v. *Smith* (*a*), where an award, that all proceedings, if any, depending at law, should be no further prosecuted, was held ill, as not being final. And also 1 *Com. Dig.* 412. *Arbitrament*, E. 15. "An award that each shall be nonsuited, or discontinue his action against the other, is not good; for they may sue de novo," referring to 1 *Rol. Abr.* 252. l. 50.

(*a*) 2 *Stra.* 1024.

Lawes

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BLANCHARD *against* LILLY and Others. The KING *against* BLANCHARD.

Lawes and *Gurney* opposed the rule, on the ground that the award was sufficiently certain; evidently meaning that all litigation should cease between the parties upon the subjects in difference between them; and they referred to *Linsey and Ashton's* case (*a*), where the award was, amongst other things, that the defendant should surcease all suits depending between the plaintiff and him, which he had done: and this was held good; and the plaintiff recovered on the arbitration-bond for breach of another part of the award.

The Court thought the award intelligible enough; and that the arbitrator's meaning necessarily to be implied from it was, that there should be a stet processus in the actions pending: but because of the cases cited, which might have misled those who applied for the rule, they discharged the rule without costs.

(*a*) *Godb.* 255.

Monday, May 30th.

HOSKINS and Another, Assignees of DEIGHTON a Bankrupt, *against* DUPEROY.

Goods sold and delivered upon an agreement to be paid for by a present bill payable at a future day does not create a present debt, on which to found a commission of bankrupt: nor can an action for goods sold and delivered be maintained by the vendor before the time when the bill agreed to be given would have become due, and when the contract would be no longer executory. Neither can such executory contract, if no such bill payable at a future day be actually given to secure it, found a good petitioning creditor's debt within the statutes 7 *Geo.* 1 *c.* 31. *s.* 1. and 5 *Geo.* 2. *c.* 30. *s.* 22. which are confined to debts due on bills, bonds, promissory notes, and other personal *written securities* of the like sort, payable at a future day; which alone by the latter statute are made available to a good petitioning creditor's debt.

THIS was an action for money had and received by the defendant to and for the use of the bankrupt, before his bankruptcy, and for money had and received to the use of the assignees after the bankruptcy, and upon an account stated by the defendant with the assignees:

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Hoskins *against* Duperoy.

to which the defendant pleaded the general issue; and on the trial at *Guildhall*, a special verdict was found, which stated, that *Deighton* before his bankruptcy carried on the trade of a calico printer and manufacturer, and on the 19th of *March* 1805 *Hamer* sold to him goods of various prices, by the yard, to the value in the whole of greatly more than 100*l*., though the exact amount of them in money was never ascertained, nor any statement thereof rendered to *Deighton*: and it was expressly stipulated and agreed between them at the time of the contract that the amount of the price should be paid by *Deighton* to *Hamer* in a present bill of exchange, payable in two months from the time of the sale and delivery of the goods; and no other contract concerning the manner of payment for the goods was agreed upon between them. *Hamer* has never yet been paid for the goods: and after the sale and delivery thereof as before stated, but before the expiration of two months from such sale or delivery, viz. on the 26th of *March* 1805, *Deighton* committed an act of bankruptcy, by departing from his dwelling-house with intent to delay his creditors, and whereby certain of his creditors were delayed (*a*): and thereupon *Hamer*, on the 22d of *April* 1805, petitioned the Chancellor for a commission of bankrupt to issue against *Deighton*, in which petition he stated that *Deighton* was indebted to him in 100*l*. and upwards for goods sold and delivered; meaning the goods sold and delivered as aforesaid on the 19th of *March*: upon which a commission of bankrupt issued against *Deighton*, dated the 1st of *May* 1805, and he was declared to be a bankrupt, and the plaintiffs were chosen

(*a*) The actual delay of a creditor is not necessary to constitute the act of bankruptcy, if the trader departed from his dwelling-house with that intent. Vide ante, 487. *Robertson* v. *Liddell*.

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HOSKINS *against* DUPREROY.

his affignees, and an affignment made to them of his effects, and they afterwards brought this action. And the queftion was, Whether the commiffion founded upon fuch petitioning creditor's debt were good? If it were, the jury affeffed the plaintiffs' damages at 2295*l.*

This cafe was argued by *Yates* for the plaintiffs, and *Marryat* for the defendant; but as all the points made in argument, and the authorities cited bearing upon them, were brought in review in the judgment of the Court, it is not neceffary to ftate them here. After time taken to advife on the cafe,

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court. After ftating the pleadings, and the facts found by the fpecial verdict—

On this fpecial verdict the fingle queftion is, Whether at the time of the act of bankruptcy, viz. on the 26th of *March* 1805, *Hamer*, the petitioning creditor, were in point of law a good petitioning creditor; he having only feven days before, viz. on the 19th of *March* 1805, fold and delivered goods to the bankrupt to the value of more than 100*l.*, though the exact amount had not been afcertained, under an exprefs contract that fuch goods fhould be paid for by a prefent bill *at two months* from the time of fuch fale and delivery. Obferve, that no fuch bill had been given or demanded; and that the two months were not expired, either at the time of the act of bankruptcy, or of the iffuing of the commiffion. The cafe on the part of the plaintiffs, the affignees, has been argued on two grounds: firft, That by the fale and delivery of the goods a prefent debt was created from the buyer *Deighton* to the feller *Hamer*. Secondly, If that be not fo, that it is within the ftatute 7 *Geo.* 1. *c.* 31. a debt proveable

able under the commission, and barred by the certificate; and by stat. 5 *Geo.* 2. *c.* 30. a good petitioning creditor's debt. As to the first ground; the verdict states the terms of the contract under which the goods were sold, viz. "that they should be paid for by a present bill, payable in two months from the time of such sale and delivery:" and in fact default had not been made in giving such bill; for the amount for which the bill was to be given does not appear to have been ever ascertained; nor was the bill ever called for or demanded. But independent of this last observation, it is now settled by the two cases alluded to in the argument, of *Mussen* v. *Price* (*a*) in this Court, and *Dutton* v. *Solomonson* (*b*) in the Court of Common Pleas, that where goods are sold upon a certain credit, to be paid for by a bill payable at a future day, the vendor cannot maintain an action for the goods sold until the time is arrived at which the bill would become due; because by the contract the goods are not to be paid for till that time. And the same doctrine is fully recognized by the more recent case in the Common Pleas, of *Brooke and Others* v. *White* (*c*), where the Court held that after the expiration of the time which the bill would have had to run, which by the terms of the contract was to have been given in payment for the goods, the seller might bring his action for goods sold and delivered; the contract being then no longer executory: the present Chief Justice and the other Judges of the Court of Common Pleas, expressly admitting the distinction established by the former cases, that before the expiration of the time on the bill, such action for the goods sold and delivered could not be maintained. On this first ground we are therefore of opinion, that at the time of the act of bank-

(*a*) 4 *East*, 147. (*b*) 3 *Bos. & Pull.* 582. (*c*) 1 *New Rep.* 330.

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HOSKINS *against* DUPREY.

ruptcy, and of the commission sued out, there was not a present debt owing from the bankrupt to *Hamer* created by the sale and delivery of the goods.

And this brings the case to the second ground, on which it has been argued on behalf of the plaintiffs, the assignees; viz. Whether this be not a good petitioning creditor's debt within the stats. 7 *Geo.* 1. c. 31. and 5 *Geo.* 2. c. 30. This question depends on the construction of the 1st section of the stat. 7 *Geo.* 1. and the 22d section of the stat. 5 *Geo.* 2. The preamble of the first of those statutes recites the mischief or doubt which existed: "Whereas merchants and traders have been "obliged to sell and dispose of their goods and mer-"chandizes to such persons as have occasion for the same "upon trust or credit, and *to take* bills, bonds, and pro-"missory notes, *or other personal securities*, for their mo-"nies payable at the end of three, four, or six months, "or other future days of payment; and the buyers of "such goods becoming bankrupts before *the money upon* "such bonds, notes, or other securities *became payable*, it "hath been a question whether such persons giving "credit *on such securities* should be let in to prove their "debts: for remedy enacts, That all persons who have "given credit, or at any time hereafter shall give cre-"dit, *on such securities* as aforesaid, upon a good and va-"luable consideration, bonâ fide, for any sum of money, "or any matter or thing whatsoever, which is or shall "be due or payable at or before the time of such person "becoming bankrupt, shall be admitted to prove his or "her several and respective bills, bonds, notes, or other "securities, *promise, or agreements for the same*, in the "like manner as if they were made payable presently, "and not at a future day." Section 3. Provides that

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no such creditor shall be deemed or taken to be a sufficient creditor, for or in respect of such debt, to petition or join in any petition for the obtaining or suing forth any commission of bankrupt, until such time as such debt shall become actually due and payable. The 22d section of the stat. 5 *Geo.* 2., which repeals the above mentioned proviso of the stat. 7 *Geo.* 1., and enables creditors on securities due at a future day to be petitioning creditors for a commission of bankrupt, recites the former act of 7 *Geo.* 1. in these words: "Whereas by an act made in the 7th year of his late majesty persons taking bills, bonds, promissory notes, or other personal security for their money, payable at a future day, (not saying *promise or agreement for the same*,) are enabled to prove their debts under a commission of bankrupt; but not to petition for or join in petitioning for any new commission; which having been found inconvenient; now it is hereby enacted, that so much of the said act as disables any *such* person from petitioning for a commission is hereby repealed; and it shall be lawful hereafter for such person to petition for any such commission, any thing in the said act contained to the contrary notwithstanding." It is observable that this clause, on which the right of such creditor to petition for a commission alone rests, mentions only persons taking bills, bonds, notes, or other personal security, payable at a future day; and although it refers to the former act, and may be said to enable such creditors to petition for a commission, as by the former act were enabled only to prove their debts under a commission; still it shews the sense which the Legislature put on the former act, and is a legislative construction of that act; namely, that such creditors only were intended as had bills, bonds, notes, or securities of the like

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fort, payable at a future day. And such appears to have been the construction adopted by the different Courts in *Westminster Hall.* Lord Ch. Just. *Lee*, at Nisi Prius, in *Swaine* v. *De Mattos* (*a*), and the Court of King's Bench, in *Pattison* v *Bankes* (*b*), considered the stat. 7 *Geo.* 1. as explained by stat. 5 *Geo.* 2., and as relating to *written securities*; though the question in those cases was not respecting the right of a creditor for goods sold, payable by bill at a future day, and where no bill or security had been given; but whether *the securities* were confined to *securities for goods sold in the course of trade*: and they held a creditor by bond or bill, payable at a future day, to be within the act; although such bond or bill were not for goods sold in the course of trade. Such was the opinion of Lord Chancellor *King* in the case *Ex parte The East India Company* (*c*); and the Court of Common Pleas, in the time of Lord Chief Justice *Wilmot*, in *Chilton* v. *Whiffin* (*d*), and in *Goddard* v. *Vanderheyden* (*e*), understood the statute in the same sense, as extending only to *written* securities; although that was not in either of the cases the point immediately in judgment. A case was also mentioned at the bar, as having been ruled at Nisi Prius at *Guildhall*, before Mr. Justice *Rooke*, (*Cox and Another, Assignees of Key, a Bankrupt*, v. *Cripps*,) where he nonsuited the assignees, on the ground that the debt of the petitioning creditor, or at least a part of it necessary to make up 100*l*., arose from goods sold and delivered upon a credit which was not expired at the time of the commission: and no motion was afterwards made in the Court of Common Pleas to set aside that nonsuit. And some of the Judges of this court so ex-

(*a*) 2 *Stra.* 1211. (*b*) *Cowp.* 540. (*c*) 2 *P. Wms.* 395.
(*d*) 3 *Wils.* 13. (*e*) 3 *Wils.* 262.

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preffed their underftanding of the ftatutes in the late cafe of *Parflow* v. *Dearlove* (*a*). We are aware that in the cafe of *Henbeft and Others* v. *Brown* (*b*), Lord *Kenyon*, at *Guildhall*, faid, that the inclination of his mind was that all debts whatever, though not due, were fufficient to fupport a commiffion; and that the act was not confined merely to bonds, notes, and bills. But the evidence there did not raife the point, and the matter was no further difcuffed. And a fhort time before, in *Cochran* v. *Love*, (fhortly noticed in *Cooke's Bank. Laws*,) Lord *Kenyon* is reported to have intimated the like opinion at *Guildhall*. The refpect due to any intimation of opinion of that very learned Judge has, as it ought, made us paufe, and examine the ftatutes with attention, and the cafes in which they have been brought under confideration of the Courts. And on the words of the acts themfelves, we think the intention of the Legiflature feems plain, to confine the power of petitioning for a commiffion of bankrupt to fuch creditors, where the debts are due at a day to come, as have *written fecurities* payable at a future day: and fuch conftruction feems to be confirmed by the greater weight of authorities which I have noticed. We are therefore of opinion, that on the facts found by this fpecial verdict there does not appear a fufficient petitioning creditor's debt to fupport the commiffion of bankrupt which has been fued out againft *Deighton*; and the plaintiffs, who found their title to recover in this action as affignees under fuch commiffion, have not fuch title. The confequence is that judgment muft be entered for the defendants.

(*a*) 4 *Eaft*, 438. (*b*) *Peake's N. P. Caf.* 54.

1808.

Monday, May 30th.

CUMING *against* BROWN.

The property of goods passes by the indorsement and delivery of the bill of lading by the consignee to another bonâ fide for a valuable consideration, and without collusion with the consignee, although the indorsee knew at the time that the consignor had not received money-payment for his goods, but had taken the consignee's acceptances payable at a future day not then arrived: and after such assignment of the bill of lading the consignor cannot stop the goods in transitu upon the insolvency of the original consignee.

THIS was an action of trover against the Captain of a ship who had signed bills of lading for some pipes of wine which had been originally consigned by *Jean* of *Jersey* (the real defendant in the cause) to *Maine* of *London*, and by him conveyed, by indorsement of the bill of lading, to the plaintiff for a valuable consideration. The invoice of the wines, which stated that they had been *bought for account of* E. Maine *of* London, was transmitted to *Maine* by *Jean* in a letter of the 31st of *December* 1806; and in another letter of the 17th of *February* 1807, *Jean* transmitted the bill of lading for the same: at the foot of the invoice was written "payable in bill on *London* at three months from the 20th *December* (1806), and marked with *Maine*'s initials." The bill of lading, signed by the defendant, bore date "*Jersey* 14th *Feb.* 1807," and expressed that the wine was to be "shipped by *P. Jean* on board the *Britannia*," and "to be delivered *to* E. Mayne *or his assigns*, he or they paying freight: with liberty to stop at *Guernsey*." *Jean* drew a bill upon *Maine* for the value of these goods, dated 20th *December* 1806, at three months; which bill, due 23d of *March* 1807, was accepted by *Maine*; and on the 23d of *February* 1807 *Maine* indorsed the bill of lading in question to the plaintiff for full and valuable consideration; and absconded about *April*; and has not since been heard of; leaving his acceptance unpaid. The goods which were first taken to *Guernsey* arrived at *London* about the beginning of *June*, and were demanded by the plaintiff of the defendant, who refused to deliver them, having been indemnified by the

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agent of *Jean* the consignor, who, on notice of the absconding and insolvency of *Maine*, claimed to stop them in transitu. There were other transactions both of goods and bills between *Maine* and *Jean* before and during the time of the transaction in question. On the part of the defendant, the answer of the plaintiff to a bill in Chancery filed by *Brown* and *Jean* was read, whereby it appeared that on the 23d *February* 1807, the plaintiff, being then a creditor of *Maine's* for about 500*l.* for goods before sold to him, applied for payment, when *Maine* requested a further advance of 1300*l.*, and proposed as a security for the payment of both sums to indorse and deliver over to him the bill of lading in question; which was agreed to, and the indorsement made accordingly: and the plaintiff thereupon gave *Maine* his acceptances to the amount agreed upon, payable some at 2 others at 3 months, which have been since duly paid. That *Maine* at the same time shewed the plaintiff the letter from *Jean* which inclosed the bill of lading of the wines (from which it was to be collected that there were mutual dealings between *Jean* and *Maine*, and that the wines were shipped on *Maine's* own account, and not as factor). That it was agreed between the plaintiff and *Maine*, that the plaintiff should be at liberty to insure the cargo for the benefit of both; which was accordingly done. The plaintiff also denied by his answer to his knowledge or belief that at the time when the bill of lading was so indorsed and delivered to him by *Maine* the latter had stopped payment, or was unable to pay his debts, or was under any pecuniary difficulties, or that he, the plaintiff, had any knowledge, belief, or suspicion of his insolvency. "That the plaintiff understood and believed at that time that the pipes of wine in question had been sold to and

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CUMING *against* BROWN.

purchased by *Maine* in the course of trade; *and that although the plaintiff was aware that they had not then been actually paid for by* Maine *or by any other person; yet he concluded that the same would be paid for or credit given to* Jean *by* Maine *in the course of their business together.* That he, the plaintiff, then understood and believed that a running account subsisted between *Jean* and *Maine*, and that they were in the habit of supplying each other with goods of different kinds; and that *Jean* usually drew bills of exchange upon *Maine* at different times to the amount in which *Maine* was indebted to him for goods supplied." And the plaintiff further denied that, at the time when the bill of lading was indorsed or delivered to him, he knew, or believed, or suspected, or had any reason to know, &c. that *Maine* would be unable to pay for the same. And he also denied obtaining the bill of lading by collusion with *Maine*. It was then objected at the trial that it appeared by the plaintiff's answer that he knew at the time he received the bill of lading that *Jean* the consignor had not been paid for the goods, and therefore upon the authority of *Salomons* v. *Nissen* (*a*), that the assignee of the bill of lading took it subject to the consignor's right of stopping the goods in transitu in case of the insolvency of the consignee before payment. And Lord *Ellenborough* C. J. left it to the jury to consider whether the indorsement were made by *Maine* to the plaintiff for a valuable consideration, and whether he had then notice of any circumstance which ought in fairness to have prevented his taking it: and under this direction the jury found a verdict for the plaintiff. In the last term a new trial was moved for on the ground, that the indorsee of the bill of lading, having actual notice of the nonpayment

(*a*) 2 *Term Rep.* 674.

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for the goods by the consignee to the consignor, was thereby placed in the same situation as the original consignee himself, and subject to all the legal and equitable rights of the consignor against such consignee, and consequently subject to the consignor's right to stop the goods in transitu on the insolvency of the consignee; although the bill of lading had been indorsed and delivered to the plaintiff for a valuable consideration: and the case of *Salomons* v. *Nissen* (*a*) was particularly relied on.

Garrow, *Park*, and *Taddy*, shewed cause on a former day against the rule for a new trial; and insisted that though the plaintiff, who was a creditor of *Maine*'s, knew that the goods had not been paid for at the time when the bill of lading was indorsed to him by *Maine*, yet he also knew that they had been consigned to *Maine* on his own account and not as factor merely, and that he had accepted bills drawn on him by *Jean* the consignor for the value of the goods in the regular course of business, which he had no reason to think would not be paid when due. He then took the indorsement of the bill of lading, bonâ fide, for a valuable consideration, without notice of *Maine*'s impending insolvency, and without any intent to aid *Maine* in defrauding *Jean* the consignor. This transaction therefore stands on the authority of *Lickbarrow* v. *Mason* (*b*), where it was ultimately decided, and it cannot

(*a*) 2 *Term Rep.* 674.

(*b*) 2 *Term Rep.* 63. 1 *H. Blac.* 357. 2 *H. Blac.* 211. 5 *Term Rep.* 367. 683. and 6 *East*, 20. which last collects all the prior authorities in a note. It was also proved by the record of *Haille* v. *Smith*, in Error, 1 *Bos.* & *Pull.* 563., that by the custom of merchants bills of lading made out to the order of the shipper or his assigns are negotiable, and transferable by the shipper's indorsement, which vests the property of the goods therein named in the indorsees.

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now be called in queſtion, that the indorſement and delivery of a bill of lading, bonâ fide, transfers the legal property of the goods to the indorſee, ſo as to deveſt the right of the conſignor to ſtop them in tranſitu. There *Freeman*, the conſignee, never paid *Turing* the conſignor for the goods, but had only accepted bills for the amount drawn on him by *Turing*, which were running at the time when *Freeman* indorſed the bill of lading to *Lickbarrow* for a valuable conſideration, and which acceptances were afterwards diſhonored. The legal title then of the indorſee of a bill of lading can only be impeached on the ground of fraud; and that was the ground on which both the caſes of *Wright* v. *Campbell* (*a*), and *Salomons* v. *Niſſen* (*b*) went. The former was the caſe of an aſſignment by a mere factor, without authority, and with ſtrong ſuſpicion of colluſion on the part of the aſſignee. The latter was either a caſe of colluſion between the conſignee of the goods and his indorſee of the bill of lading, who had notice that the goods had not been paid for; or at leaſt it was a caſe of partnerſhip between them, in which view the latter was to be taken to ſtand in the ſhoes of the former with reſpect to the conſignor, who had not been paid for his goods, and who, therefore, according to all the caſes, had a right to ſtop them in tranſitu. But all the Court there aſſented to the doctrine of *Lickbarrow* v. *Maſon*. [*Bayley* J. It was part of the agreement in *Salomons* v. *Niſſen*, that *Salomons* ſhould ſtand in the place of the original conſignee and pay the conſignor.] There could have been no queſtion in any of the caſes as to the conſignor's right of ſtopping in tranſitu if nothing ſhort of actual payment by the conſignee could have deveſted the right: but the property of goods paſſes to the

(*a*) 4 *Burr.* 2046. (*b*) 2 *Term Rep.* 674.

vendee

vendee by the mere contract of fale, according to *Hinde* v. *Whitehoufe* (*a*); and by *Shep. Touch.* 222. If the fale be for ready money, the vendor has a lien on the goods till the money is paid; but not if the fale be upon credit till a future day. So here where the fale was upon the credit of acceptances to be given payable at a future day, the vendor had no lien after fuch acceptances given. It appears then, that fo far from the plaintiff having had notice, in any fraudulent fenfe, that the goods had not been paid for, at the time he took the affignment of the bill of lading, he had exprefs notice that *Maine* had at that time complied with the terms of the contract of fale by having given the confignor his acceptances then running, upon the credit of which the confignor was content to part with the property of the goods to *Maine*. And as this is the common courfe of dealing with refpect to foreign confignments, to determine againft this plaintiff's right to hold the goods would be in effect to determine that bills of lading, though transferrable by law, fhould no longer be transferred: for if queftions of equity, as between the confignor and confignee, are to be entered into againft a bonâ fide indorfee of the bill of lading, there can be no fafety in taking fuch a fecurity, as there is if the legal title untouched by fraud is to prevail.

The Attorney General, *Tpping*, and *Pailey*, contrà, relied upon the fact, that the plaintiff knew at the time he took the indorfement of the bill of lading that the goods had not been paid for, as diftinguifhing this from the cafe of *Lickbarrow* v. *Mafon*; though they admitted that if their objection prevailed it would tend to narrow very much the doctrine fuppofed to be there laid down as

(*a*) 7 *Eaft*, 558.

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to the general negotiability of bills of lading. But they contended that it had been so narrowed in the case of *Salomons* v. *Nissen* (a). The intention of forwarding the bills of lading before the goods originally was, not to enable the consignee to assign them away without payment, but to put him in a condition to claim them on their arrival. The bill of lading in itself is nothing more than an undertaking by the Captain to deliver the goods to the order of the shipper; and it is hard enough upon him, whose right to stop in transitu in case of the insolvency of his consignee is acknowledged on all hands, that such right can in any case be devested by the consignee's assignment, without notice that the goods have not been paid for: but it has never yet been decided that the assignee, having that notice at the time, acquires by the assignment a better and more indefeasible title than the person from whom he received it: on the contrary, in *Salomons* v. *Nissen*, the fact of such knowledge by the assignee was held to take the case out of the rule of *Lickbarrow* v. *Mason*, and to subject him to the consignor's right of stopping in transitu. No other fraud was or could be imputed to the plaintiff in that case than what arose out of his knowledge that the goods had not been paid for; for he himself had actually given a valuable consideration for them to the consignee; and the opinion of each of the Judges was founded on that circumstance. With this limitation the rule established in *Lickbarrow* v. *Mason*, as to the negotiability of bills of lading, will become more useful and equitable. While every person must be taken to know that a bill of lading is transferrable, he must also be taken to know that the vendor has a right to stop the goods in transitu if he have not been

(a) 2 *Term Rep.* 674.

paid

paid for them: but whether he have or have not may not be known. As against the consignee who has such knowledge, the consignor may stop the goods in transitu: then if his assignee have the same knowledge at the time he takes the assignment, how does his case differ in justice and reason from that of the original consignee? and if it be the same, though the present legal property may still pass by the assignment, it will still be subject to the consignor's contingent legal right of stoppage. But if the assignee take the bill of lading without knowing the state of the account between the consignor and consignee, then his present legal title will prevail against the contingent right of the consignor. In this view alone, the two rights will not be inconsistent or contradictory: but, without this restriction, the right of stopping in transitu will be rendered nugatory; and whenever the occasion has called for it, the general rule has been laid down with this qualification.

Curia adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court. After stating the facts, and the questions submitted to the jury, with their finding—

The question is whether the indorsement of the bill of lading in this case passed the property of the goods, the plaintiff having notice that the goods had not been paid for in *money*. It must be taken to have been found that the indorsement was, bonâ fide, for valuable consideration, and without notice of any circumstance which ought in fairness to have prevented the plaintiffs taking it; unless, indeed, notice that the goods had not been paid for in money be such circumstance. But to render this circumstance one which ought in fairness to have prevented the assignee of the bill of lading from taking it, it should have

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have appeared that the consignor by the terms of his dealing with the consignee had bargained for or expected that the payment should precede the assignment of the bill of lading. But if we look at the actual facts of the case, as between the consignor and consignee, by the memorandum at the foot of the invoice transmitted before the bill of lading, (and which arrived on the 3d of *January* 1806), the price of the goods was "payable in bill "on *London* at 3 months from 20th *December*;" and at the time of the assignment *Maine*, the consignee, had done all that such bargain required, by having accepted a bill on *London* at 3 months from the 20th of *December*, which was not due at the time of the indorsement of the bill of lading on the 23d of *February*. If therefore the plaintiff had known all the circumstances of the case as they stood between consignor and consignee, he would have known nothing which should have made it unfair in the consignee to assign, or in himself to accept, the assignment of the bill of lading. If he had assisted in contravening the actual terms of sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith, it would have been otherwise, and he would in that case have stood in the same situation with the consignee. If, for instance, he had known that the consignee had been in insolvent circumstances, and that no bill had been accepted by him for the price of the goods, or that, being accepted, it was not likely to be paid; in that case the interposition of himself between the consignor and consignee, in order to assist the latter to disappoint the just rights and expectations of the former, would have been an act done in fraud of the consignor's right to stop in transitu, and would therefore have been unavailable to the party taking

an assignment of the bill of lading under such circumstances, and for such purpose: but here, any knowledge or suspicion of the kind on the part of the plaintiff is negatived expressly by the plaintiff's answer read on the part of the defendant. And if a bill of lading should be held by us not assignable under these circumstances, the consequence would be that no bill of lading could be deemed safely assignable before the goods arrived, unless the assignee of the bill of lading was perfectly assured that the goods were paid for in money, or paid for in account between the parties, which is the same thing: a position which would tend to overturn the general practice and course of dealing of the commercial world on this subject, and which is warranted as we conceive by no decided case upon the subject. The case of *Salomons* v. *Nissen*, 2 *Term Rep.* 674. was a case of fraud on the part of the plaintiff, who had taken an assignment from the vendee, not only knowing the goods were not paid for, but by his own agreement taking upon himself personally the immediate duty of paying for them: and he afterwards brought his action to take the goods out of the hands of the defendant, the vendor, without having paid for them, in fraud of the terms of his own express agreement with the original vendee, with whom he had become partner in profit and loss as to these goods, and with whom he had expressly contracted that he would himself pay for them. This case therefore, being a case of express fraud and mala fides, affords no principle to govern the present case, in which the absence of fraud and mala fides is found. The doubt which has been thrown on this subject has arisen principally from the words, "*without notice*," which are to be found in the case of *Salomons* v. *Nissen* and other cases on the subject.

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But we think that, according to the general ſcope and meaning of the paſſages in the opinions of the Judges where this expreſſion occurs, it is not to be underſtood in the reſtrained ſenſe contended for; viz. "*without notice that the goods had not been paid for*;" but, "*without notice of ſuch circumſtances as rendered the bill of lading not fairly and honeſtly aſſignable.*" The criterion being, according to Mr. Juſtice *Buller* in that caſe, (p. 681.) *Does the purchaſer take it fairly and honeſtly?* And ſo underſtanding ſuch expreſſion, or at any rate ſo underſtanding the rule of law on the ſubject, we think that in this caſe no circumſtance appears to have exiſted at the time of the aſſignment of this bill of lading which ſhould have prevented the plaintiff from taking it, or which ſhould now render it not available in his hands. We are of opinion therefore that the rule for a new trial in this caſe ſhould be diſcharged.

Monday, May 30th.

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Whether or not the particular ſchemes denounced by the ſtat. 6 *Geo.* 1. *c.* 18. *ſ.* 18. as *manifeſtly tending to the common grievance, prejudice, and inconvenience*, of great numbers of ſubjects in their trade and other affairs; ſuch as the raiſing a great ſum by ſubſcription for trading purpoſes, and making the ſhares in the joint *ſtock transferrable*; be in themſelves unlawful and prohibited, without reference to the *fact* of ſuch tendency in the particular inſtance in the opinion of a Court and jury; at any rate the inviting of ſuch ſubſcriptions by holding out falſe and illegal conditions, ſuch as that the ſubſcribers would not be liable beyond the amount of their reſpective ſhares, ſeems to be an offence within the act. But as the ſtatute had not been acted upon for a great length of time, and was now ſought to be enforced by a private relator, who ſeemed not to have been deluded by the project, but to have ſubſcribed with a view to this application, the Court refuſed to interfere by granting an information, though they diſcharged the rule without coſts.

THE defendant, ſometime in the year 1807, publiſhed and circulated two different ſchemes; one of them, intitled, "Proſpectus for the *London* Paper "Manufacturing Company;" the other, "A Proſ-"pectus of the intended *London* Diſtillery Company "for making and rectifying genuine *Britiſh* Spirits, Cor-

"dials, and Compounds." By the firſt of theſe it was propoſed, amongſt other things, to raiſe by ſubſcription 50,000*l.* by twenty five hundred transferrable ſhares of 50*l.* each, payable by inſtalments not exceeding 10*l.* per cent.: the whole to be under a deed of truſt or enrolment in Chancery; "by which no party (it was ſaid) could be accountable for more than the ſum ſubſcribed under the regulations therein ſtipulated:" and the perſons qualified to be choſen directors by the amount of their ſhares were to be taken in the rotation in which they ſubſcribed. The great advantages of this ſcheme over other paper manufactories were extolled throughout the proſpectus. The other ſcheme, for a Diſtillery Company, which was alſo held forth in terms of extravagant praiſe to attract popular favour, propoſed to raiſe 100,000*l.* by two thouſand transferrable ſhares at 50*l.* each, payable by inſtalments not exceeding 10*l.* per cent, at twenty days notice; to be in like manner under a deed of truſt enrolled in Chancery, "by which no party was to be accountable for more than the ſum ſubſcribed under the regulations ſtipulated therein." This alſo was to be under the management of directors properly qualified, to be nominated in rotation as they ſubſcribed. Annexed to the former ſcheme was a ſuppoſed report to the directors of the *London* Diſtillery Company from the defendant, ſtating that he had begun in *May* or *June* 1807 taking in 1*l.* ſubſcriptions; and ſpeaking of the large ſums which would be required for the purchaſe of premiſes, &c.; and naming different individuals, amongſt others himſelf, to be elected to the principal employments in the concern.

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The Attorney-General (on the part of a private relator), moved the Court on a former day for a criminal information against the defendant as the framer and promoter of these schemes, which he contended to be against the express provisions and plain policy of the stat. 6 *Geo.* 1. *c.* 18. *s.* 18. and supported the application by an affidavit verifying the issuing of these printed proposals by the defendant, to whom application was made by the deponent for information respecting the nature of them, and from whom he received a prospectus as to the paper manufactory. That the deponent agreed to subscribe to it, and paid the defendant 5*l.* as for an instalment of 10*l.* per cent. on a transferrable share of 50*l.* And in answer to an inquiry by the deponent what return would be made if the scheme did not succeed, the defendant answered 2½*l.* per cent. on each share: and at the same time mentioned that the subscriptions to the distillery scheme which he had to offer to the public had been all full three months before, and that the shares bore a premium, but he thought he could get the deponent one for a premium of 10*l.* or 20*l.* Facts of a similar nature were also sworn to, with respect to the defendant's taking subscriptions for the distillery scheme in a book kept in an office for that purpose, and for which a clerk in the office delivered receipts purporting to be signed by the defendant as surveyor; and that at the same time the defendant came into the office and conversed with another person present on the nature of the undertaking, who also subscribed.

The stat. 6 *Geo.* 1. *c.* 18. *s.* 18. (*a*), on which this application was founded, reciting that "whereas it is no-"torious

(*a*) Mr. Justice *Blackstone*, in B. 4 *c.* 8. of his Commentaries, says that this statute was enacted in the year after the infamous *South Sea* project

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" torious that feveral undertakings or projects of diffe-" rent kinds have at times fince *June* 1718 been pub-" licly contrived and practifed, or attempted to be prac-" tifed, within *London* and other parts of the kingdom, " as alfo in *Ireland*, and other dominions of the king, " which manifeftly tend to the common grievance, pre-" judice, and inconvenience of great numbers of fubjects " in their trade or commerce or other their affairs; and the " perfons who contrive or attempt fuch dangerous and " mifchievous undertakings or projects, under falfe pre-" tences of public good, do prefume according to their " own devices and fchemes, to open books for public " fubfcriptions, and draw in many unwary perfons to " fubfcribe therein, towards raifing great fums of " money; whereupon the fubfcribers or claimants " under them do pay large proportions thereof, &c.; " which dangerous and mifchievous projects relate to " feveral fifheries and other affairs wherein the trade, " commerce, and welfare of the fubjects, or great num-" bers of them, are interefted. And whereas in many " cafes the faid undertakers or fubfcribers have prefumed " to act as if they were corporate bodies, and have pre-" tended to make their fhares in ftocks transferrable or " affignable without any legal authority, &c. (Then " after ftating fome inftances of illegal acting under ob-" folete or pretended charters;) and many other unwar-" rantable practices, too many to enumerate, have been " and may hereafter be contrived, fet on foot, or pro-" ceeded upon, to the ruin of many fubjects, &c. And

ject had beggared half the nation. It was obferved, however, in the argument, from *Anderfon's Hiftory of Commerce*, that the *South Sea* bubble, as it was called, burft after the act was paffed, which was in 1718, two years after the failure of *Law's* project in *France*.

" whereas

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" whereas it is abfolutely neceffary that all public un-" dertakings and attempts, tending to the common " grievance, prejudice, and inconvenience of the fubjects " in general, or great numbers of them, in their trade, " commerce, or other lawful affairs, be effectually fup-" preffed," &c. For remedy enacts, " that all and every " the undertakings and attempts defcribed as aforefaid, " and all other public undertakings and attempts tending " to the common grievance, prejudice, and inconvenience " of his Majefty's fubjects, or great numbers of them, in " their trade, commerce, or other lawful affairs, and all " public fubfcriptions, receipts, payments, affignments, " transfers, pretended affignments and transfers, and all " other matters and things whatfoever for furthering, " countenancing, or proceeding in any fuch undertaking " or attempt, and more particularly the acting or prefum-" ing to act as a corporate body, the raifing, or pretend-" ing to raife, transferrable ftock, the transferring, or " pretending to transfer or affign, any fhare in fuch " ftock, without legal authority, &c. fhall be deemed " illegal and void, &c."

S. 19. enacts that all fuch unlawful undertakings and attempts fo tending to the common grievance, &c. fhall be deemed public nufances, and fubjects the offenders to the penalties of præmunire, in addition to the fines, penalties and punifhments of perfons convicted of common and public nufances. And fubfequent claufes give other remedies in refpect of thefe grievances. With a provifo (*f.* 25.) that the act fhall not be conftrued to prohibit or reftrain the carrying on of partnerfhips, in trade in fuch manner as had been before ufually and may legally be done.

Garrow,

Garrow, *Park*, *Jervis*, *Lawes*, and *Adolphus*, shewed cause against the information, and denied that there was any apparent mischievous tendency or public grievance in these schemes, (the one of which was to supply better and cheaper paper, and the other to supply better and cheaper *British* spirits to the public than they had at present;) without which they were not within the letter, and still less within the spirit of the law. The relator does not pretend to say that the money was attempted to be raised, without any real intention to apply it to the purposes in view, in fraud of the subscribers; or that the schemes themselves are impracticable and fallacious; but the objects which are openly avowed are such as, if realized, must not only be advantageous to the subscribers, but to the public at large. They are fair objects of trade, meant to be obtained by fair competition with other traders; but as a larger capital was required than it is in general practicable for a few private partners to raise, it was proposed to accomplish it by inviting many subscribers to form a joint stock. Then if the object were legal, and it would have been legal for any number of persons to have met by appointment and entered into partnership for this purpose, as they may for any purpose of trade, (except in the coal trade, and in that of bankers, and of insurance, under different acts), the mere circumstance of inviting others by advertisement to join them in such an undertaking cannot make it unlawful, nor the defendant's mistake of the law in supposing that each partner would only be accountable for the joint debts incurred to the amount of his subscription. Then the circumstance of this association, if legal in its object and beneficial in its nature and tendency, being to be accomplished *by transferrable shares* is not in itself made illegal by

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by the act of Parliament, unless the Court see clearly that it has, in the words of the act, a manifest tendency to the common grievance, prejudice and inconvenience of the public. It is only put by way of example amongst other means which may have that tendency: but still the Court must be satisfied that the scheme itself to be promoted by those means has such mischievous tendency. They also dwelt on the hardship of instituting a prosecution of this sort upon a statute, which, except in the instance of a prosecution against *Caywood* (a) within two years after it passed, does not appear by any case in print to have been acted upon: and he is there represented to have been a projector of an unlawful undertaking to carry on a trade to the *North Seas*, whereby *many* of his Majesty's subjects had been *defrauded* of *great* sums. And they urged that the Court would not put in force so penal a law at the instance of a private relator, who had himself voluntarily, without solicitation from the defendant, or any one connected with him, become a subscriber, with a view as it seemed, of preferring this complaint; when if the evil were of magnitude sufficient to call for public redress, the *Attorney General* might file an information ex officio against the offenders.

The Attorney General, *Best* Serjt. and *Abbott*, in support of the rule, premised that the only probable reason why this branch of the statute had not been acted upon for so long a time was because it had corrected the evil it was intended to suppress, till now of late when it had shewn itself again, and it was again necessary, in proportion as schemes of this sort multiplied (and the public had heard

(a) 1 *Stra* 472, and 2 *Ld. Ray.* 1361.

of

of others on foot besides those in question), to put this wholesome law in force. They then argued from the wording of the statute that the Legislature meant to prohibit altogether projects of this nature, described by certain indicia as tending in their nature to the common grievance, prejudice and inconvenience of the subject. It states that it was *notorious* that projects of different kinds had been of late practised or attempted to be practised which *manifestly* tended to the common grievance, &c. that the persons who continued or attempted such *dangerous and mischievous* projects, under *false pretences of public good* (and such are blazoned forth in these schemes), presumed *to open books for public subscription*; that they drew in the subscribers or claimants under them *to pay small proportions thereof*: some of them, it is said, presumed to act as corporate bodies, and had pretended to *make their shares in stocks transferrable*, without any legal authority. All these acts, which are to be found in the present case, are declared to be dangerous and mischievous. But then the legislature go on further to recite more generally, that it is necessary that *all public* undertakings and attempts tending to the common grievance, &c. of the subjects in their trade or lawful affairs should be suppressed: and then it enacts for remedy that *all undertakings and attempts as aforesaid*;" (which must mean all those particularly described in the first part of the preamble,) " and all " *other* public undertakings *tending to* the common griev- " ance, &c. (which evidently points to the general " words at the conclusion of the preamble,) " and all " other matters and things whatsoever for furthering, " countenancing, or proceeding in any such undertaking;" and *more particularly* (inter alia) the pretending to raise

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transferrable stocks, or to *assign shares in such stocks*, &c. without authority of Parliament or of the Crown, are declared to be illegal and void. That the particular acts described are in themselves unlawful, as being assumed to have a mischievous and dangerous tendency, is further evident from the 21st section, which subjects to punishment any broker who shall act as such in contracting for the sale or purchase "of any share or interest in any "of the undertakings by the act *declared to be unlawful*." But unless the particular acts themselves described are to be taken as expressly prohibited without any reference to what a jury may consider as their tendency, how is a broker to know whether a jury will consider them as *tending to the common grievance*, so as to govern his conduct in exercising his business of a broker. But if the construction of the act were otherwise, it cannot be doubted that these schemes come within the spirit of it. They hold out a false lure to the subscribers, that they shall not be answerable for more than the amount of their shares, which is calculated to ensnare the unwary; while extravagant hopes of gain are proclaimed to allure the greedy; and adventurous persons of small property are drawn in by the facility held out of paying their subscriptions by small instalments; which is one of the mischiefs intended to be prevented by the act. There are also mischiefs of a more general nature affecting others than the subscribers themselves; for when a multitude of persons are engaged in a commercial adventure with transferrable shares, it is next to impossible for those who deal with them to know to whom they are giving credit, or for the members themselves to know the extent of their own responsibility. It is impracticable for 500 persons to sue or be sued with effect.

effect. And the individual shareholder does not get rid of the evil by parting with his share; as he still remains liable not only for the partnership debts contracted during the time he held it, but also for those contracted afterwards with one who may have continued to deal with the company on his credit, not knowing that he had ceased to be a partner. One of the special objects of the act therefore was to prevent numbers of persons clubbing together with transferrable shares for the purpose of carrying on trade. It was considered as a crafty expedient to enable the original projectors, after having possessed themselves of the joint stock and subscription funds, to withdraw themselves from responsibility: but if the shares are not transferrable, then the loss and ruin will fall as it ought upon the original projectors. One object of the legislature was to secure simple individuals against the ruinous consequences of such projects, where great hopes are holden out to the public on false foundations; a large fund to be collected by numerous subscriptions of small sums, of which the chief projector is to retain a principal share in the management; and the shares to be transferrable in order to facilitate the escape of those who are in the secret, and to make redress more difficult and fruitless. Another object was to secure the public. Legal corporations are known, and can be made responsible by their property, and punished by the forfeiture of their charter; but bodies of this sort, indefinitely numerous and having only individual existence, can with difficulty be traced, and cannot afford the same protection to the public who deal with them.

Lord ELLENBOROUGH C. J., at the conclusion of the argument, observed that it was a question of considerable

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novelty upon the construction of the act, which, though of some standing, could not be considered as obsolete: yet the long period which had intervened since the passing of the law, and the little use which appeared to have been made of it, might perhaps afford some excuse for this party, and for others who of late may have been engaged in similar projects, if it should appear that they had fallen unawares into the commission of an offence. The Court would therefore take into consideration, first, whether the acts imputed to the defendant were illegal; and next, whether under the circumstances it might be proper to grant the information prayed for. The first question was of very extensive consequence, as it might affect other cases: and the Court would wish their decision to have as much public benefit with as little private inconvenience as possible. Two days afterwards his Lordship delivered the opinion of the Court to this effect.

The case has been very fully argued, and the application for an information has at least had this good effect, that it has produced a full discussion of the question, and has given a general notoriety to the existence of the statute of the 6th of *Geo.* 1., so that no person can hereafter pretend to say that it is an obsolete law, and on that account no longer to be enforced against such as offend against the provisions of it. After a lapse, however, of 87 years since any authenticated proceeding has been had upon this branch of the act, and when other ways are still open to the party now applying to put this act in force against offenders, the Court in the exercise of a sound discretion, under all the circumstances of the case, will forbear to interfere in this extraordinary manner. But at the same time we wish it to be understood that it

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is not becaufe we think that the facts brought before us are not within the penalty of the law: but we choofe to exprefs ourfelves with the greater referve, becaufe the defendant may ftill be indicted, and the Court may ftill be called, upon the removal of the indictment by certiorari, or upon an information filed by the Attorney-General, to give their opinion on this very cafe. But independent of the general tendency of fchemes of the nature of the project now before us to occafion prejudice to the public, there is befides in this profpectus a prominent feature of mifchief; for it therein appears to be held out that no perfon is to be accountable beyond the amount of the fhare for which he fhall fubfcribe, the conditions of which are to be included in a deed of truft to be enrolled. But this is a mifchievous delufion, calculated to enfnare the unwary public. As to the fubfcribers themfelves, indeed, they may ftipulate with each other for this contracted refponfibility; but as to the reft of the world it is clear that each partner is liable to the whole amount of the debts contracted by the partnerfhip. I forbear to comment on leffer circumftances; fuch as the fmallnefs of the fum to be fubfcribed in the firft inftance, which feems to carry an appearance of holding out a lure to the unwary; and other features in the cafe. But confidering that this is brought forward after a lapfe of fo many years fince any fimilar profecution was inftituted, and brought forward by a party who does not profefs to have been himfelf deluded by the project; and the ftatute having been paffed principally for the protection of unwary perfons from delufions of this kind; the Court think, in the exercife of their difcretion, that they fhould not now enforce the ftatute

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against this defendant at the relation of a person so circumstanced; leaving the relator to the common law remedy by indictment, or the defendant to be proceeded against by his Majesty's Attorney-General ex officio, if he should deem it adviseable for the protection of the public. But the Court think it is fit that this rule should be discharged without costs. And they recommend it as a matter of prudence to the parties concerned, that they should forbear to carry into execution this mischievous project, or any other speculative project of the like nature, founded on joint stock and transferrable shares: and we hope that this intimation will prevent others from engaging in the like mischievous and illegal projects.

Rule discharged, without costs.

Monday, May 30th.

LLOYD *against* MAURICE.

The *English* notice required by the stat. 5 *G.* 2. *c.* 27. *s.* 4 is to be on the *copy* of the process and not on the writ itself; and the service of such copy without the notice is irregular and will be set aside; though the Court discharged a rule for quashing the writ itself on this account.

THE *Attorney-General* shewed cause against a rule for quashing a writ of latitat, because the copy of the process served on the defendant had not the *English* notice on it required by the stat. 5 *Geo.* 2. *c.* 27. *s.* 4.: and admitted that the service of the copy was void for want of such notice on the copy of the writ served, as required by the act; but contended that the writ of latitat itself, which, in fact, had such notice upon it, was good; and the act only requires the *English* notice to be on the copy served.

W. E. Taunton said that the act meant to identify the copy of the writ served with the writ itself in this respect

ſpect. The only uſe of the *Engliſh* notice was on the copy of the proceſs ſerved: it was uſeleſs, and not required by the act, on the writ itſelf. 1808.

LLOYD *against* MAURICE

The Court agreed that the *Engliſh* notice was only required to be on the copy of the proceſs ſerved, and need not be on the writ itſelf; and that for want of ſuch notice the ſervice of the copy was irregular: but the writ itſelf being perfect when iſſued could not be quaſhed; and therefore this rule muſt be diſcharged.

MEMORANDUM.

AT the end of this term *Wm. Manley* Eſq. of the Middle Temple, and *Albert Pell* Eſq. and *Wm. Rough* Eſq. of the Inner Temple, were called Serjeants, and took for their motto "Pro Rege et Lege."

END OF EASTER TERM.

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PRINCIPAL MATTERS.

mon: but if all her daughters should die without leaving any *issue*, then, after the decease of the survivor, in trust for her grandson, in fee, who was her *heir at law*: the residue of her real and personal estate to her three daughters. Upon a bill filed by the grandson, in the lifetime of the surviving daughter, to restrain the tenant from cutting timber, &c.; and after a conveyance of the premises to the uses of the will; held that under the will and deeds of lease and release the three daughters took no legal estates, but that the releasee took an estate for the lives of the daughters; and that such of their children as should be living at the death of the survivor of the daughters would take estates *in fee*, as tenants in common. *Robinson* v. *Grey and Others*, *M.* 48 *G.* 3. 1

2. Proof that the defendant agreed to sell his horse warranted sound to the plaintiff for 31*l.* 10*s.*, and at the same time agreed that if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for 14*l.* 14*s.*, and that the difference only should be paid to the defendant, will support a count charging only, that in consideration that the plaintiff would buy of the defendant a horse for 31*l.* 10*s.* the defendant promised that it was sound; and that in fact the plaintiff did buy the horse *for that price*, and *did pay to the defendant the said* 31*l.* 10*s.* *Hands* v. *Burton*, *E.* 48 *G.* 3. 349

ALIEN ENEMY.

The Court would not stay judgment and execution on a summary application, because the plaintiffs after verdict became alien enemies. *Vanbrynen* v. *Wilson*, *H.* 48 *G.* 3. 321

AMENDMENT.

Order to amend writs of fi. fa. facias on a judgment, and declaration thereon, conformably to the judgment roll. *Braswell* v. *Jeco*, *H.* 48 *G.* 3. 316

ANNUITY.

1. Where tenant for life conveyed estates to trustees for 99 years, if he should so long live, in trust to raise money by the grant of annuities for his life; and afterwards he and the trustees granted an annuity to one by deed, reciting the former conveyance to the trustees, it is not necessary by the annuity act 17 *G.* 3. *c.* 26. to inroll a memorial of the trust deed; it not being "a deed, instrument, or assurance *whereby any annuity is granted*," but only a deed of conveyance to those who afterwards granted the annuity, and constituting their title to the estate charged therewith. *O'Callaghan* v. *Ingilby*, *M.* 48 *G.* 3. 135

2. Where the memorial of a bond, conditioned to secure an annuity, recited in the condition an indenture between the same parties, and part of the same assurance, which stated the annuity to be granted "for the "price of 1800*l.*, which said sum of "1800*l.* *was paid by the grantee to* "*the grantors by his draft* on *R.* and "Co. his bankers *at or before* the "sealing and delivery of the said "indenture and bond;" and the memorial of the said indenture stated that the indenture witnessed that "in consideration of 1800*l.* to the "grantors, *in hand paid* by the gran-"tee, and which was *paid to them by* "*his draft* on *R.* and Co. his "bankers, &c. *the payment and re-*"*ceipt of which said* 1800*l.* *the* "*grantors did thereby acknowledge*," the annuity was granted: this does sufficiently import, *that the considera-*
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tion money was actually received by the grantee through the medium of the draft, *before* the execution of the deeds granting the annuity; so as to dispense with the necessity of setting out in the memorial the particulars of such draft, with the time of payment. *ib.*

3. The annuity act does not require that the estates charged with the annuity should be specifically set forth in the memorial: and therefore it is no objection that the memorial only stated the annuity to be charged on all the grantor's estates in the county of *York* and all other his premises conveyed to certain trustees. *ib.* 135

4. It is no objection to the memorial of the deed granting the annuity, that it stated it in general terms, to contain "powers of distress and entry, as stated in the deed;" for the annuity act does not require such powers to be stated, except as far as they create a trust, which brings them within the branch of the act relating to trustees. *ib.* Nor,

5. Is the memorial required to state the covenants of the grantors for the due payment of the annuity. *ib.*

APPEAL.

By the stat. 35 *G.* 3. *c.* 101. *s.* 2. the party aggrieved by an order of Justices, directing payment, to the amount of above 20*l.* of the charges and costs of the suspension of an order of removal, on account of the illness of the pauper, may appeal to the next sessions, in like manner as against an order of removal, though he omit to give notice of such his appeal within three days after the demand of such charges and costs; by which he makes himself liable to a distress for the amount. And if on appeal the former order be vacated, or the amount of the charges to be paid be reduced, the surplus, if before levied by distress, must be refunded. *The King* v. *The Inhabitants of Bradford, M.* 48 *G.* 3. 97

APPRENTICE.

An indenture binding an adult as an apprentice, which was not executed by herself, but only by her father-in-law and the master, though with her consent, does not constitute her an apprentice; and consequently no settlement can be gained by her under such indenture. *The King* v. *The Inhabitants of Ripon, H.* 48 *G.* 3. 295

ARREST.

One who had been appointed Consul General from the *Porte*, but was dismissed several months before from his employment, and another person resident here appointed in his room, is not at any rate privileged from arrest; though at the time of the arrest he had not received any official notification of his dismissal, or of the appointment of the other. *Marshall* v. *Critico, E.* 48 *G.* 3. 447

ASSUMPSIT.

1. A customer paying bills, not due, into his bankers in the country, whose custom it was to credit their customers for the amount of such bills, if approved, as cash (charging interest), is entitled to recover back such bills in specie from the bankers becoming bankrupt; the balance of his cash account, independent of such bills, being in his favour at the time of the bankruptcy: and if payment be afterwards received upon such bills by the assignees, they are liable to refund it to the customer in an action for money had and received. *Giles* v. *Perkins and Others, Assignees of Dickenson and Others, M.* 48 *G.* 3. 12

2. One

2. One who had voluntarily offered to pay a sum of money for the use of the poor of the parish, in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor, which offer was consented to by a magistrate, and the money accordingly paid by the party to the master of the workhouse for the use of the poor; may at any rate countermand the application of the money before it is so applied; and may recover it back in an action for money had and received. *Taylor* v. *Lendey*, *M.* 48 *G.* 3. 49

3. The law will not raise an assumpsit upon a judgment obtained by default in one of the colonies against a party, who upon the face of the proceedings appeared only to have been *summoned* "by nailing up a copy of the declaration at the court-house door;" it not appearing that he had ever been present in the colony, or subject to the jurisdiction of the colonial court at the time of the suit commenced or afterwards: although by a law of the colony if a defendant be *absent from the island*, and have no attorney, manager, or overseer there, such mode of summoning him shall be deemed good service: for the *absence* thereby intended is of one who had been *present* and subject to the jurisdiction: though even if it had been meant to reach strangers to the jurisdiction, it would not have bound them. *Buchanan* v. *Rucker*, *H.* 48 *G.* 3. 192

4. Proof that the defendant agreed to sell his horse warranted sound to the plaintiff for 31*l.* 10*s.*, and at the same time agreed that if the plaintiff would take his horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for 14*l.* 14*s.*, and that the difference only should be paid to the defendant, will support a count charging only, that in consideration that the plaintiff would buy of the defendant a horse for 31*l.* 10*s.*, the defendant promised that it was sound, and that in fact the plaintiff did buy the horse *for that price*, and *did pay to the defendant the said* 31l. 10s. *Hands* v. *Burton*, *E.* 48 *G.* 3. 349

5. Where money in litigation between two parties has by mutual consent been paid over to a trustee, in trust for the party entitled, it can only be sued for and recovered from the stakeholder by the party entitled to it, and not from the original party who was indebted; though he agreed to wave all objections to form. *Ker* v. *Osborne*, *E.* 48 *G.* 3. 378

ATTORNEY.

An attorney of *B. R.* in pleading his privilege against being sued by original, improperly stated the custom of this court to be not to compel its attornies to answer an original writ, *unless first forejudged from their office*, &c. (which is the custom in *C. B.* but not in this court): but held that enough appearing to sustain the plea, the custom which had no foundation here (of which the court would take notice) might be rejected as surplusage. *Stokes* v. *Mason*, *E.* 48 *G.* 3. 424

AUTERFOITS ACQUIT.

One was indicted in *Middlesex* for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a prout patet by the affidavit affiled in the court of *B. R.* at *Westminster*, &c. and on this he was acquitted: after which he was indicted again *in Middlesex* for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, in which it was stated to have been sworn *in London*; which was

was traversed by an averment that in fact the defendant was so sworn *in Middlesex* and *not in London*: and held that he was entitled to plead auterfoits acquit; for the *jurat* was not conclusive as to the *place* of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and therefore the defendant had been once before put in jeopardy for the same offence. *The King* v. *Emden*, *E.* 48 *G.* 3. 437

AUTHORITY.

One who had voluntarily offered to pay a sum of money for the use of the poor of the parish, in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor; which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the court-house for the use of the poor; may at any rate countermand the application of the money before it is so applied, and may recover it back in an action for money had and received. *Taylor* v. *Lendey*, *M.* 48 *G.* 3. 49

AWARD.

1. An award, that certain actions be *discontinued*, and each party pay his own costs, is final and good; being in effect an award of a stet processus. *Blanchard* v. *Lilly*, *E.* 48 *G.* 3. 497
2. Where by the rule of reference the costs were to *abide the event* of an award; that includes the *costs* of the *reference* as well as of the *cause*. *Wood* v. *O'Kelly*, *E.* 48 *G.* 3. 436

BAIL.

1. None can be holden to special bail in detinue or trover without a judge's order. *Reg. Gen. H.* 48 *G.* 3. 325
2. Bail above having been put in, and, exception entered in the vacation, notice of justification for the first day of the next term must be given within 4 days after such exception. *Neillson* v. *King*, *E.* 48 *G.* 3. 434

BAIL BOND.

Where the writ was to appear before the King *wheresoever he should then be in* England, and the sheriff took a bail bond for the party's appearance before the King *at Westminster* on the day named in the writ; held to be a substantial compliance with the stat. 23 *H.* 6. *c.* 9. so as to entitle the assignee of the sheriff to recover on such bond. *Jones* v. *Stordy*, *M.* 48 *G.* 3. 55

BANKER.

See INFRA BANKRUPT, 1.

BANK NOTES.

See EXECUTION, 1.

BANKRUPT.

1. A customer paying bills, not due, into his bankers in the country, whose custom it was to credit their customers for the amount of such bills, if approved, as cash, (charging interest), is entitled to recover back such bills in specie from the bankers becoming bankrupts; the balance of his cash account, independent of such bills, being in his favour at the time of the bankruptcy: and if payment be afterwards received upon such bills by the assignees, they are liable to refund it to the customer in an action for money had and received. *Giles* v. *Perkins and Others*, *Assignees of Dickenson and Others*, *M.* 48 *G.* 3. *ib.*
2. Neither the bankrupt, nor any person claiming from him by assignment

ment subsequent to the commission of bankrupt, shall be permitted in an action at law to question the validity of such commission, and recover from the assignees the property of the bankrupt taken under it, by proving an act of bankruptcy committed by the bankrupt prior to the petitioning creditor's debt; though it be also shewn that there was a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy, whereon a better commission might have been sued out. *Donovan, Assignee of Kennet an Insolvent Debtor,* v. *Duff, Assignee of the same Kennet, under a Commission of Bankrupt, M.* 48 *G.* 3. 21

3. The certificate of a bankrupt, allowed after the filing of the plaintiff's bill and before plea pleaded, is evidence to support the general plea in bar given by the stat. 5 *G.* 2. *c.* 30. *s.* 7. viz. that before the exhibiting of the plaintiff's bill the defendant became a bankrupt, and that the cause of action accrued before he became a bankrupt. *Harris* v. *James, M.* 48 *G.* 3. 82

4. *A.*, *B.*, and *C.*, partners and distillers, occupied certain premises leased to *A.* and another, and used in common in the trade the stills, vats, and utensils necessary for carrying it on, the property of which stills, &c. afterwards appeared to be in *A.* On the dissolution of the partnership, which was a losing concern, it was agreed that *C.* and one *J.* should carry on the business on the premises; and by deed between the two last and *A.* it was covenanted and agreed, that *A.* should withdraw from the business, and permit *C.* and *J.* to use, occupy, and enjoy the distill-house and premises, paying the reserved rent, &c. and the several stills, vats, and utensils of trade specified and numbered in a schedule annexed, in consideration of an annuity to be paid by *C.* and *J.* to *A.* and his wife and the survivor; with liberty for *C.* and *J.*, on the decease of *A.* and his wife, to purchase the distill-house and premises for the remainder of *A.*'s term, and the stills, vats, &c. mentioned in the schedule: and *C.* and *J.* covenanted to keep the stills, vats, and utensils in repair, and deliver them up at the time, if not purchased: and there was a proviso for re-entry if the annuity were two months in arrear. Under this, *C.* and *J.* took possession of the premises, with the stills, vats, and utensils, and carried on the business as before; and made payments of the annuity, which afterwards fell in arrear more than two months; but *A.*'s widow and executrix who survived him did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of *C.* and *J.* who continued in possession of the stills, vats, and utensils on the premises.—

On a question, whether such stills, vats, and utensils, so continuing in possession of *C.* and *J.* the new partners, and used by them in their trade in the same manner as they had been by the former partners, of whom *A.* the owner was one, passed under the stat. 21 *Jac.* 1. *c.* 19. *s.* 10. and 11. to the assignees of *C.* and *J.*, as being in the *possession, order, and disposition,* of the bankrupts at the time of their bankruptcy as *reputed owners*: and nothing appearing to the world to rebut the presumption of true ownership in the bankrupts arising out of their possession and reputed ownership, (of which reputed ownership the jury are to judge from the circumstances;) held,

1. That the stills which were fixed to the freehold did not pass to the assignees under the words *goods and chattels* in the statute.

2. That the vats, &c. which were not so fixed, did pass to the assignees

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as being left by the true owner in the possession, order and disposition (as it appeared to the eye of the world) of the bankrupts, as reputed owners.

3. That the case would have admitted of a different consideration if there had been a usage in the trade for the utensils of it to be let out to the traders; as that might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of them. *Horn* v. *Baker*, *H.* 48 *G.* 3. 215

5. The costs of a suit in Chancery, directed to be paid by an award made before the bankruptcy of the defendant, but which costs were not taxed till after he became bankrupt, cannot be proved under the commission; but the bankrupt remains liable to be attached for the amount under the award made a rule of court. *The King* v. *Davies*, *H.* 48 *G.* 3. 318

6. The departure of a trader from his dwelling house, with intent to delay his creditors, is an act of bankruptcy, though no creditor be thereby in fact delayed. And the words in the stat. 1 *Jac.* 1. *c.* 15. *s.* 2. following this and other acts of bankruptcy committed, viz. "to the intent or whereby his creditors shall or may be defeated or delayed," &c. are to be read, "to the intent his creditors shall or whereby (or that thereby) they may be defeated," &c. But the lying in prison 6 months upon an arrest is made a substantive act of bankruptcy independent of any intent of the trader. So in the case of an act of bankruptcy by the trader's beginning to keep house the denial of a creditor is usually given in evidence, not to shew the fact of the creditor's being delayed, but as evidence to explain the equivocal act of the trader's keeping in his house, and to shew that he began to keep house with intent to delay his creditors. *Robertson* v. *Liddel*, *E* 48 *G.* 3. 487.

7. Goods sold and delivered upon an agreement to be paid for by a present bill payable at a future date does not create a present debt, on which to found a commission of bankrupt: nor can an action for goods sold and delivered be maintained by the vendor before the time when the bill agreed to be given would have become due, when the contract would be no longer executory. Neither can such executory contract, if such bill payable at a future day be actually given to secure it, found a good petitioning creditor's debt within the statutes 7 *G.* 1. *c.* 31. *s.* 1. and 5 *G.* 2. *c.* 30. *s.* 22. which are confined to debts due on bills, bonds, promissory notes, and other personal written securities of the like sort, payable at a future day; which alone by the latter statute are made available to found a good petitioning creditor's debt. *Hoskins* v. *Duperoy*, *E.* 48 *G.* 3. 498

BASTARD.

See ORDER OF JUSTICES, 1.

1. *One* magistrate committing the mother of a bastard child to custody for not filiating the child is yet entitled to the previous notice of action required by the stat. 24 *G.* 3. *c.* 44. though by the stat. 18 *Eliz.* *c.* 3. *s.* 2. jurisdiction over the subject matter is given to *two* magistrates. *Weller* v. *Toke*, *E.* 48 *G.* 3. 364

2. A married woman pregnant in the absence of her husband with a child, which when born would by law be a bastard, is removeable as an unmarried woman under sect. 6. of stat. 35 *G.* 3. *c.* 101. *The King* v. *The Inhabitants of Tibbenham*, *E.* 48 *G.* 3. 388

BILL OF LADING.

The property of goods passes by the indorsement and delivery of the bill of

of lading by the confignee to another bonâ fide for a valuable confideration, and without collufion with the confignee; although the indorfee knew at the time that the confignor had not received money payment for his goods, but had taken the confignee's acceptances payable at a future day not then arrived: and after fuch affignment of the bill of lading the confignor cannot ftop the goods in tranfitu upon the infolvency of the original confignee. *Cuming* v. *Brown*, *E.* 48 *G.* 3. 500

BILLS OF EXCHANGE.

1. *A.* and *B.* having exchanged their acceptances of bills drawn by each on the other at fo many day's date; held that the delivery of the refpective bills for acceptance, and the re-delivery of the fame by the acceptors to the refpective drawers, was a negotiation of the bills; and that fuch bills could not, after they had been fo exchanged for valuable confideration (as the exchange of acceptances is) for 20 days, be poft-dated without a new ftamp, as upon new bills; although during all that time each had remained in the hands of the original drawer. *Cardwell* v. *Martin*, *H.* 48 *G.* 3. 190
2. Where the indorfee of a bill of exchange lodged it with his bankers, who prefented it for payment on the 4th, when it was difhonored; and on the 5th they returned it to the indorfee, who gave notice to the drawer of the difhonor on the 6th by the two-penny poft: held fuch notice to be reafonable. *Scott* v. *Lifford*, *E.* 48 *G.* 3. 347

BOND.

1. To debt on bond conditioned for the payment of a fum of money, which the condition ftated to have been *taken up, borrowed, and received* by the defendants of the plaintiffs at refpondentia intereft, fecured by a cargo of goods fhipped from *Calcutta* to *Oftend*; it is competent to the defendant to plead that the bond was given to fecure the price of goods fold by the plaintiffs to the defendants in the *Eaft Indies*, and illegally prepared by the plaintiffs for fhipment from thence to beyond the *Cape of Good Hope*, without the licence of the *Eaft India* Company; without proceeding to ftate formally, that the condition was colourable, to conceal the illegality of the tranfaction, and to negative that the bond was given for money *taken up, borrowed, and received*, &c. For the ftatement in the plea is rather explanatory of, than abfolutely inconfiftent with, the tranfaction ftated in the condition of the bond: but if it were inconfiftent with it, the plea would ftill be good in this form. *Paxton* v. *Popham*, *E.* 48 *G.* 3. 408
2. An officer cannot commute for money the fervices of an impreffed man, nor let him go for money; and a bond given to fecure the man's return on non-payment of fuch money is void; and may be avoided by plea difclofing the true tranfaction, and fhewing that the man was illegally impreffed. *Pole* v. *Harrobin*, *E.* 22 *G.* 3. *B. R.* 416

BUILDING ACT.

In trefpafs againft the owner of a houfe adjoining to the plaintiff's in the metropolis, for taking down his party wall and building on it, the defendant fhewing at the trial that he was authorifed in doing the thing complained of under the building act 14 *G.* 3. c. 78. is entitled to treble cofts under the 10th fection, upon a nonfuit. *Collins* v. *Poney*, *H.* 48 *G.* 3. 322

COMPOUNDING.

See MISDEMEANOR COMPOUNDING.

CON-

CONSUL.

See ARREST.

CONTRACT.

See TRADE, I.

CONVEYANCE VOLUNTARY.

A *voluntary* settlement of lands made *in consideration of natural love and affection* is void as against a subsequent purchaser for a *valuable* consideration, though with notice of the prior settlement before all the purchase money was paid, or the deeds executed; and though the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction: for the law, which is in all cases the judge of fraud and covin arising out of facts and intents, infers fraud in this case, upon the construction of the stat. 27 *Eliz. c.* 4. *Doe d. Otley* v. *Manning, M.* 48 G. 3. 59

CONVICTION.

Though it be proper for a magistrate in drawing up a conviction on the stat. 5 *Ann. c.* 14. to state the particular evidence of the fact on which his judgment is founded, and not merely the legal effect of such evidence, in the words of the statute, yet a conviction in the latter form is valid in law: but the magistrate subjects himself to an information if he endeavour to shelter himself from detection by mis-stating such legal result when the evidence would not warrant it. *The King* v. *Pearse, E.* 48 *G.* 3. 350

COPYHOLD.

See SURRENDER.

CORPORATION.

1. The charter of *Saltash* empowers the mayor, justice of the peace, and the rest of the aldermen (seven in all), or the major part of them, of whom the mayor and justice to be two, when it shall seem to them *convenient and necessary*, to elect as many free burgesses as shall please them, *and to the same free burgesses so elected to administer an oath, &c.* The defendant was elected a free burgess in *October* 1804, and in *December* 1806, at a meeting of six out of the seven aldermen, in consequence of a mandamus to them to fill up the vacant place of alderman, and which meeting the mayor said was held for that sole purpose, the defendant tendered himself to be sworn in; against which 3 aldermen protested, one of whom immediately left the assembly; but before the other two protestors withdrew, the mayor, with the assent of two other aldermen, administered the oath of office to the defendant. Held,

1st, That the swearing in of the burgess might well be at a time subsequent to the election; he having had a present legal capacity to be sworn in at the time of his election; and therefore not like the case of an infant elected.

2dly, That the act of swearing in, being merely ministerial, may be done by the mayor, as presiding officer, in the presence of the majority of the mayor and aldermen, by whom such act was required to be done, whensoever and howsoever assembled, and without any previous summons for this purpose; there being no dissent by the majority at the time when the oath was so administered.

3dly, Though three, an equal number of those first assembled, protested against the defendant's being sworn in when he first tendered himself

himself to take the oath; yet one of the protestors having withdrawn, it was competent to the majority who remained to administer the oath; no vote having been come to by the major part at first assembled to preclude the body from doing the act at that meeting.

4thly, *Quære*, Whether, if it be found against a defendant in quo warranto, that, though duly elected, he was not duly sworn in, there can be any other judgment against him than of *ouster absolute*; there being no instance of a judgment of *ouster quousque*. *The King* v. *Courtenay*, *H.* 48 *G.* 3. 246

2. But where the new mayor of *New Romney* was required by charter to be sworn in *before* the old mayor, a swearing in by the town clerk, the usual officer to administer the oath, *before* the old mayor, but against the consent and direction of the latter, was held void. *Rex* v. *Ellis*, *M.* 8 *G.* 2. *B. R.* cited in *Rex* v. *Courtenay.* 252

3. The neglect to be sworn into an office for above 20 years after the party's election to it is evidence of his refusal to accept the office: as his acquiescence unexplained for so long time in the election of another person into the office is an evidence of his renunciation of it, and the acceptance of such renunciation by the body. *Rex* v. *Jordan*, *tempore Lord Hardwicke*, cited *ibid.* 263

4. Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with that intent; yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. *Derby Canal Company* v. *Wilmot*, *E.* 48 *G.* 3. 360

CORRECTION, HOUSE OF.

See PRISONER, I.

COSTS.

See DAMAGES AND COSTS.

1. In an order of filiation and maintenance the justices have no power by the stat. 18 *Eliz. c.* 3. to direct the defendant to pay the costs of the parish in obtaining the order: but having in such order separated the sum to be paid for maintenance, and the sum to be paid for costs, the order was quashed as to the latter, and confirmed as to the rest of it. *The King* v. *Sweet*, *M.* 48 *G.* 3. 25

2. In trespass against the owner of a house adjoining to the plaintiff's in the metropolis, for taking down his party-wall and building on it, the defendant shewing at the trial that he was authorized in doing the thing complained of under the building act 14 *G.* 3. *c.* 78. is entitled to treble costs under the 10th section, upon a nonsuit. *Collins* v. *Poney*, *H.* 48 *G.* 3. 322

3. The costs of a suit in Chancery directed to be paid by an award made before the bankruptcy of the defendant, but which costs were not taxed till after he became bankrupt, cannot be proved under the commission; but the bankrupt remains liable to be attached for the amount under the award made a rule of court. *The King* v. *Davis*, *H.* 48 *G.* 3. 318

4. In a special count on a policy, the risk was stated to continue until the ship was unloaded, and there were common counts: held that the premium having been paid into court generally was an admission of the contract stated in the special count; and that it was not competent to the defendant to shew that the policy, by which the risk was originally made to cease after the ship was moored 24 hours in safety, was afterwards

wards altered by the broker without the defendant's knowledge. But the defendant having afterwards obtained a rule to amend the rule for paying money into court, by confining it to the money counts, and for a new trial on payment of costs; and the plaintiffs thereupon determining to take the money out of court, and not to proceed further, is entitled to all the costs of the action, and not merely to the usual costs of a new trial. *Andrews* v. *Palsgrave*, *H.* 48 *G.* 3. 325

5. Where by the rule of reference the costs were to *abide the event* of an award; that includes the *costs* of the *reference* as well as of the *cause*. *Wood* v. *O'Kelly*, *E.* 48 *G.* 3. 436

COVENANT.

A variance in setting out one of several covenants in a lease, on which breaches were assigned, viz. the *Cellarbeer* field, instead of the *Allerbeer* field; being considered as part of the description of the deed declared on; though the plaintiff waved going for damages on the breach of that covenant; is fatal. *Pitt* v. *Green*, *H.* 48 *G.* 3. 188

CUSTOM.

Where a plea of justification in trespass for taking two horses, as heriots, stated a custom in the manor that the lord *from time immemorial, until the division* of a certain tenement into moieties, had taken and been accustomed to take a heriot upon the death of every tenant dying seised; and *since the division* the lord had taken and been *accustomed* to take on the death of every tenant dying seised of either of the moieties a heriot for each moiety: this must be taken to be one entire custom, and not two distinct customs, the one applicable to the tenement *before*, and the other *after* the division of it: and being said to be an *immemorial* custom, it is disproved by evidence that the division was made within memory. *Kingsmill, Bart.* v. *Bull*, *H.* 48 *G.* 3. 185

DAMAGES AND COSTS.

In an action on the case against the sheriff for negligent and wrongful conduct in conducting the sale of the plaintiff's goods under a writ of fieri facias, by which they were sold much under value, where, in stating the substance of the writ, the count alleged that the sheriff was commanded to levy 80*s*. awarded to *J. C.* for his *damages* sustained *by occasion of the detaining the debt*; that is proved by the writ which stated that the 80*s*. were awarded to *J. C.* for his *damages* sustained *as well* by reason of *detaining the debt* as for his *costs*, &c.; for *costs* are in legal sense included in the word *damages*. *Phillips* v. *Bacon*, *H.* 48 *G.* 3. 198

DAY-RULE.

A day-rule, when made, covers, by relation back, the liberation of a prisoner who had signed the petition, but had gone out of the prison before the sitting of the court on the same day; though the marshal were sued for the escape before the sitting of the court. *Field* v. *Jones*, *M.* 48 *G.* 3. 151

DEBTOR AND CREDITOR.

See Insurance of Life, 1.

DEED.

See Conveyance. Surrender, 1. or, Description of Persons, 1.

Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with that intent; yet it has no such

such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. *Derby Canal Company* v. *Wilmot*, *E.* 48 *G.* 3. 360

DEMISE.

See LEASE.

DESCRIPTION OF PERSONS.

John Lealand surrendered a copyhold in the occupation of him *John Lealand* to the use of *Joseph* Lealand and *John* Lealand *his son*, for their lives and the life of the survivor; remainder to the heirs of the body of the *said John* Lealand *son of Joseph* L.; remainder to the right heirs of *the said* John Lealand: held, that the ultimate remainder was meant for the right heirs of *John the surrenderor*; as well because *John the surrenderee* is before described with the addition of *the son of Joseph*; as of the manifest futility of giving *John the surrenderee* an estate *tail*, and afterwards a *fee* in succession. Though if the construction had been left doubtful, the ultimate remainder would have continued in the surrenderor. *Roe d. Hucknall* v. *Foster*, *E.* 48 *G.* 3. 405

DESERTER.

See SETTLEMENT BY HIRING AND SERVICE, I.

DEVISE.

1. One, having entered into articles of agreement for the purchase of certain premises, devised the same to a trustee to pay the rents and profits to her three daughters (one of them being covert), and the survivor of them, for their lives, share and share alike: and, after their decease, in trust for all and every the *child and children* of her three daughters who should be living at the death of the survivor of them, as tenants in common: but if all her daughters should die without leaving any *issue*, then, after the decease of the survivor, in trust for her grandson, in fee, who was her *heir at law*: the residue of her real and personal estate to her three daughters. Upon a bill filed by the grandson, in the lifetime of the surviving daughter, to restrain the tenant from cutting timber, &c.; and after a conveyance of the premises to the uses of the will; held that under the will and deeds of lease and release the three daughters took no legal estates, but that the releasee took an estate for the lives of the daughters; and that such of their children as should be living at the death of the survivor of the daughters would take estates *in fee*, as tenants in common. *Robinson* v. *Grey and Others*, *M.* 48 *G.* 3. 1

2. *J. P.* devised real and personal estate to trustees, to pay thereout an annuity to his wife for life, and out of the residue to pay sufficient for the maintenance, education, and support of his only daughter, *until she should attain the age of* 21 *years, or marry*; and when she should attain 21, or marry, then to her in fee: but in case his daughter should *die under age and unmarried*, then the estates to go to his wife for life; and, after her decease, *to the two children of his nephew*, as tenants in common in fee; with a proviso, that if either his wife or daughter should *marry a Scotchman*, then his wife or daughter *so marrying* should *forfeit* all benefit under his will, and the estates given to such his wife or daughter as should so marry *should descend to such person or persons as would be entitled under his will, in the same manner as if his wife or daughter were dead.* Held, that such partial restraint of marriage was legal; and that the daughter

having

having while under age married a *Scotchman* and died, leaving a son, such son could not inherit, nor her husband be tenant by the curtesy; but that the limitation over (the testator's wife being also dead) to the two children of the testator's nephew (which nephew was still living,) took effect immediately on such marriage; they being the persons designated by the will to take in the event which had happened; the testator having considered such prohibited marriage the same as the death of his daughter, under age, unmarried. *Perrin* v. *Lyon*, *M* 48 *G*. 3. 170

3. Where there is no connexion by grammatical construction or direct words of reference, or by the declaration of some common purpose, between distinct devises in a will, the special terms of one devise cannot be drawn in aid of the construction of another, although in its general terms and import similar, and applicable to persons standing in the same degree of relationship to the testator; and there being no apparent reason, other than the different wording of the clauses, to presume that the testator had a different purpose in view.

Therefore, where the testator having a son married, and six grandsons and three grand-daughters, and three farms, devised *all* his lands to his son *for life*; and after his death gave to his eldest grandson *Thomas* (the defendant) *the north side of Down farm*, and to his grand-daughter *Frances the south side* of the same farm; and to his grandsons *George* and *Edmund*, and his grand-daughter *Elizabeth*, "*the upper part* "*of Lain farm*, equally between "them so long as they should remain "single; but if either married, then "to have *paid by the other two ten* "*pounds* a year for his or her life;" and to his grandsons *Edward* and *John*, and his grand-daughters *Mary*, and *Ann*, "*the lower part of Lain* "*farm*, equally between them (which "made them tenants in common) "so long as they remained single; "but if either married, then 10*l*. a-"*year* (not saying, *to be paid by the* "*others*) for his or her life:" and then gave the third farm to another grandson: held, that on the marriage of *Edward*, *Mary*, and *Ann*, their co-devisee of the lower part of the *Lain* farm, *John*, who remained single, could not recover the 3-4ths of the farm forfeited by their marriage, as upon the supposition that the 10*l*. a-year for life to each of the devisees so marrying was to be paid *by him* who remained single; as in the corresponding devise of the other part of the *Lain farm*: but the 3-4ths may be chargeable with the annuities of 10*l*. a-year to each in the hands of the heir at law, who was entitled to those shares.

Neither could the grandchildren take a fee by implication in the shares so devised to them generally, without words of limitation, merely from the circumstance that an express estate *for life* was first given to the testator's son and heir at law. *Right d. Compton* v. *Compton*, *H*. 48 *G*. 3. 267

4. By a bequest of leasehold to *R*. *until his* (eldest) *son* T. *shall attain* 21, *and no longer*: but *in case* T. *shall die in minority*, *then to* J. *or* O. (his younger brothers) or either surviving or attaining 21, as aforesaid; with a desire that *R*. would *quit and deliver up the premises as aforesaid*, and *confirming* the bequest of them to *R*.'s family on his relinquishment of a certain claim, which he did relinquish: held, that *T*. on his attaining 21 took the estate by necessary implication; though there were a devise of the residue to *N*. the younger brother of *R*. *Goodright* v. *Hoskins*, *H*. 48 *G*. 3. 306

 5. Under

5. Under a devise to *A.* for life, remainder to *B.* and her heirs; but if *B.* die before *A.*, *or* if she die without heirs of her body, then to *C* and his heirs, &c: held, that the devise over to *C.* after *B.* could only take effect if *B.* died before *A. and* without issue; for that unless *or* were read as *and*, the devisee over would take if *B.* died before *A*, although *B.* left issue; which would clearly be against the apparent intent of the devisor, which was to prefer the issue of *B.* to *C.* *Denn d. Wilkins* v. *Kemeys*, *E.* 48 *G.* 3. 366

6. It seems that *freehold* may pass by a will giving the estate a local description and name, though it be mistakenly called *leasehold*; there being no other property answering to the name and description. *ibid.*

7. Under a devise of land to the testator's son *Joseph*, his *heirs* and *assigns for ever*; but in case his son should *die without issue, then*, to go to the child of which his second wife was enfient: held, that *Joseph* took an estate tail. *Doe d. Ellis* v. *Ellis*, *E.* 48 *G.* 3. 382

8. Under a devise of land to the two children of the testator's brother *W.*, when they attained the age of 21 years; but the executor to account to them for the profits until the age of 21, or day of marriage: but *if either should die before* 21, the survivor to be *heir* to the other: held that the fee passed, which would go over to the survivor in case one died under 21, and would descend or be disposeable if he died after attaining 21: and that a devise of other land to the two children of another brother *R.* *on the same condition as* W.'s *children*, was governed by the same construction. *Doe d. Wight* v. *Cundall*, *E.* 48 *G.* 3. 400

9. One, having a *freehold manor* of *Sutton*, and *freehold* lands *there*, and having also *copyhold* within the *township of Sutton*, and within the local ambit of the manor, but held of another manor; and having surrendered his copyhold to the use of his will; devised all his *manor* of *S.*, and all his messuages, *farms*, lands, tenements, and hereditaments whatsoever, *within the precincts and territories* of *S* in the county of *Chester*, with their rights, members, and appurtenances, in trust for his daughter *L.*, (having devised other estates in other counties to two other daughters,) and to her children in strict settlement: held, 1. That *farms*, lands, &c. within the *township*, though *not* within the *manor*, of *Sutton*, passed by the description of *farms*, &c. *within the precincts and territories of* S. 2. That the general words "messuages, *farms*, lands," &c. and particularly the word *farms*, were sufficient to carry *copyhold* as well as *freehold* in the place described, if such appeared to be the intent of the testator upon the whole will. 3. That such intent was evinced in this case by the word *farms*, where it appeared that the testator had a farm composed of copyhold and freehold, which he had let as one entire subject, and which must otherwise be divided: and also by this, that he had charged the property devised beyond the annual income of it, unless the *copyhold* were included. And that this intent was not rebutted by a power of leasing for 21 years given to all the tenants for life; nor by power to the trustees to raise portions by grants of long terms of years. 4. That a small copyhold distant 8 miles, and a small freehold 20 miles from *Sutton*, but within the county of *Chester*, did not pass by that devise, but did pass under a general residuary clause to another daughter. *Doe d. Belasyse* v. *The Earl of Lucan*, *E.* 48 *G.* 3. 448

DOGS.

DOGS.

See ACTION ON THE CASE, 1.

EJECTMENT.

See LANDLORD AND TENANT, 1.

Where ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the stat. 4 *Hen.* 7. *c.* 24., it is not necessary for the lessor to prove an actual entry to avoid such fine; considering it to operate only as a fine at common law: but by the defendant's confession of lease, entry, and ouster, the merits only of the lessor's title are put in issue. *Doe* v. *Watts*, *M.* 48 *G.* 3. 17

ENEMY.

See TRADE, 1.

ESCAPE.

See PRISONER, 1.

A day-rule, when made, covers by relation back the liberation of a prisoner who had signed the petition, but had gone out of the prison before the sitting of the court on the same day; though the marshal were sued for the escape before the sitting of the court. *Field* v. *Jones*, *Marshal of K. B. Prison*, *M.* 48 *G.* 3. 151

ESTATE.

One, having entered into articles of agreement for the purchase of certain premises, devised the same to a trustee to pay the rents and profits to her three daughters (one of them being covert), and the survivor of them, for their lives, share and share alike: and, after their decease, in trust for all and every the *child and children* of her three daughters who should be living at the death of the survivor of them, as tenants in common: but if all her daughters should die without leaving any *issue*, then, after the decease of the survivor, in trust for her grandson in fee, who was her *heir at law*: the residue of her real and personal estate to her three daughters. Upon a bill filed by the grandson, in the lifetime of the surviving daughter, to restrain the tenant from cutting timber, &c., and after a conveyance of the premises to the uses of the will; held, that under the will and deeds of lease and release the three daughters took no legal estates, but that the releasee took an estate for the lives of the daughters; and that such of their children as should be living at the death of the survivor of the daughters would take estates *in fee*, as tenants in common. *Robinson* v. *Grey and Others*, *M.* 48 *G.* 3. 1

EVIDENCE.

See BANKRUPT, 2. and other particular titles.

In an action on the case for a malicious prosecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to have been before the action brought: and therefore a variance in that respect between the day laid and the day stated in the record, which was produced to prove the acquittal, is not material; the day not being laid in the declaration as part of the description of such record of acquittal. *Purcell* v. *Macnamara*, *M.* 48 *G.* 3. 157

EXECUTION.

See ACTION ON THE CASE, 2.

The court will not order the sheriff to retain in satisfaction of a present writ of fi. fa., issued by the plaintiff against

against the defendant, *money* or *Bank notes*, which the sheriff had before received for the use of the defendant, in discharge of an execution levied by the defendant against another, and which the sheriff had not paid over. *Knight* v. *Criddle*, *M.* 48 G. 3. 48

FILIATION, ORDER OF.

See Bastard. Order of Justices, 1.

FINE.

Where ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the stat. 4 *H.* 7. *c.* 24., it is not necessary for the lessor to prove an actual entry to avoid such fine; considering it to operate only as a fine at common law: but by the defendant's confession of lease, entry, and ouster, the merits only of the lessor's title are put in issue. *Doe* v. *Watts*, *M.* 48 G. 3. 17

FOREIGN JUDGMENT.

The law will not raise an assumpsit upon a judgment obtained by default in one of the colonies against a party, who upon the face of the proceedings appeared only to have been *summoned* "by nailing up a copy of the declaration at the court-house door;" it not appearing that he had ever been present in the colony, or subject to the jurisdiction of the colonial court at the time of the suit commenced or afterwards: although by a law of the colony if a defendant be *absent from the island*, and have no attorney, manager, or overseer there, such mode of summoning him shall be deemed good service: for the *absence* thereby intended is of one who had been *present* and subject to the jurisdiction: though even if it had been meant to reach strangers to the jurisdiction, it would not have bound them. *Buchanan* v. *Rucker*, *H.* 48 G. 3. 192

FOREIGN MINISTER.

See Arrest.

FRANCHISE.

By the long established and recognized practice of *B. R.* a writ of capias, with a non omittas clause, may issue in the first instance, and be executed by the sheriff within a particular liberty, (such as the honor of *Pontefract* in the county of *York*,) the bailiff of which has the execution and return of writs, without a prior writ of latitat first issued, and a return made by the sheriff of mandavi ballivo qui nullum dedit responsum; and therefore no action on the case lies by the bailiff of such liberty against the party suing out such writ, upon an allegation that it was *wrongfully, injuriously, and deceitfully* caused to be issued by him, to the damage of the bailiff's office, &c. *Carrett* v. *Smallpage*, *E.* 48 G. 3. 330

FRAUD.

The law is in all cases the judge of fraud and covin arising out of facts and intents, and will infer fraud, upon the construction of the stat. 27 *Eliz. c.* 4., in the case of a *voluntary* settlement, made in consideration of natural love and affection, against a subsequent purchaser for a *valuable* consideration, though with notice of the prior settlement before all the purchase-money was paid or the deeds executed. *Doe d. Otley* v. *Manning*, *M.* 48 G. 3. 59

FRAUDS, STATUTE OF.

A guarantie in writing to pay for any goods which the vendor delivers to a third

a third person is good, within the 4th sect. of the statute of frauds, as containing a sufficient description of the *consideration* of the promise, (namely, the delivery of the goods when made,) as of the *promise* itself; both of which are included in the word *agreement*, required by that section to be reduced into writing, &c. *Stadt* v. *Lill*, *E*. 48 *G*. 3. 348

FREEHOLD.

See DEVISE, 6.

GRANT.

See LEASE, 1.

GREENLAND FISHERY.

See IMPRESS, 1.

GUARANTIE.

See FRAUDS, STATUTE OF. TRADE, 1.

HOUSE OF CORRECTION.

See PRISONER.

HUSBAND AND WIFE.

A feme covert living apart from her husband, under sentence of separation, with alimony allowed, pendente lite, in the ecclesiastical court, having brought trespass in the name of her husband against wrong doors for breaking and entering her house and taking her goods, the Court refused on the application of such defendants to stay the action, though supported by an affidavit of the husband (who had not released the action, nor applied to be indemnified against the risk of costs,) that the action was brought without his authority. *Chambers* v. *Donaldson*, *E*. 48 *G*. 471

IMPRESS.

1. The stat. 13. *G*. 2. *c*. 28. *s*. 5. exempting from the impress service any harpooner, &c. or *seaman* in the *Greenland* fishery trade, is impliedly repealed by the stat. 26 *G*. 3. *c*. 41. *s*. 17. which exempts such harpooner, &c. *whose name shall be inserted in a list*, required to be delivered on oath by the owner of the vessel to the collector of the customs; and which also exempts any *seaman* entered on board any ship intended to proceed on the said fishery in the following season, *whose name shall be inserted in a list to be delivered as aforesaid*, and who shall have given *security*, &c. to proceed, and shall proceed accordingly: for the latter statute superadds the insertion of the seaman's name in such list as a condition precedent to the exemption. *Caruthers Ex parte*, *M*. 48 *G*. 3. 44
2. It does not appear that the freemen and liverymen of *London* are exempted from being impressed for the sea service, if in other respects fit subjects for that service. *The King* v. *Young*, *E*. 48 *G*. 3. 466

INDICTMENT.

1. One was indicted in *Middlesex* for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a prout patet by the affidavit affiled in the court of *B*. *R*. at *Westminster*, &c. and on this he was acquitted: after which he was indicted again *in Middlesex* for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, in which it was stated to have been sworn *in London*; which was traversed by an averment that in fact the defendant was so sworn *in Middlesex* and *not in London*: and held that he was entitled to plead auterfoits acquit; for the *jurat* was not

not conclusive as to the *place* of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and therefore the defendant had been once before put in jeopardy for the same offence. *The King* v. *Emden*, *E.* 48 *G.* 3. 437

2. Whether or not the particular schemes denounced by the st. 6 *G.* 1. *c.* 18. *s.* 18. as manifestly tending to the common grievance, prejudice and inconvenience of great numbers of subjects in their trade and other affairs, be in themselves unlawful and prohibited, without reference to the fact of such tendency in a particular instance in the opinion of a court and jury; such as the raising great sums by subscription for trading purposes, and making the shares in the joint stock transferrable; at any rate the inviting of such subscriptions by holding out false and illegal conditions, such as that the subscribers would not be liable beyond the amount of their respective shares, seems to be an offence within the act. But as the statute had not been acted upon for a great length of time, and was now sought to be enforced by a private relator who seemed not to have been deluded by the project, but to have subscribed with a view to this application, the Court refused to interfere by granting an information, though they discharged the rule without costs. *The King* v. *Dodd*, *E.* 48 *G.* 3. 516

INSURANCE.

See Payment of Money into Court, 1.

1. The stat. 43 *G.* 3. *c.* 153. *s.* 15. having enabled the king by order in council to license the importation of certain goods, being *British* or neutral property, from the enemy's country, in neutral ships; a contract made by *A* and *B.* *British* subjects, (the plaintiffs) for the purchase of brandy from a house of trade in *France* (an enemy,) to be shipped from thence in a neutral, on account of *A.* and *B.*; which contract was made *in contemplation of obtaining a licence* for that purpose; which licence was accordingly obtained soon after the making of such contract, and before it was begun to be executed; is a legal contract, and may lawfully be guarantied in the first instance by *C.* and *D.* other *British* subjects (the defendants). And after such licence obtained, the guarantees are liable in damages for the non-shipment of the goods by the house in *France* on board a neutral sent there for that purpose. Though it were objected to the licence legalizing such trade, that it was not made out to *A.* and *B.* *by name*, but only to *C.* and *D.* and *other British merchants*; and that neither *C.* and *D.*, nor even *A.* and *B.*, had any property in the goods; whereas the licence required the goods to be imported to be *the property of the said persons or some of them*; and, until shipment, the property continued in the house in *France*. For neither the act of parliament, nor the king's licence, required the owners of the property to be *individually named*; and even if the licence were to be so construed, as it only required the goods imported to be the property of "the "said persons or some of them, *as* "*may be specified in their bills of lad*-"*ing*;" and as no bills of lading were made out, which might have been made in the names of *C.* and *D.*, and if so, would have conveyed to them a legal or special property in the goods; the defendants *C.* and *D.* were still liable to answer in damages, upon their guarantie, as for the non-performance of a legal contract. *Timson* v. *Merac*, *M.* 48 *G.* 3. 35

2. It

2. It is not an implied condition in a common marine policy on ship and freight, that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay or otherwise increasing the risk of the insurers: and therefore where a ship was compelled in the course of her voyage to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course, by reason of a scarcity at her lading ports; and during her justifiable stay in the port so entered for that purpose she took on board bullion there on freight, which the jury found did not occasion any delay in the voyage; it was held not to avoid the policy. *Raine* v. *Bell*, *H.* 48 *G.* 3. 195

3. It is no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country; the voyage and commerce not being of a hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of this country; though the neutral thereby subjects his ship to be detained and carried into a *British* port for the purpose of search. And therefore a *British* underwriter, after condemnation of the enemy's goods found on board, and liberation of the ship and the rest of the cargo, is liable to the neutral owner of goods insured in the same ship, whose voyage was so interrupted, either as for a total loss, if notice of abandonment upon the loss of the voyage be given in reasonable time; or for an average loss, if such notice be given out of time. *Barker* v. *Blakes*, *H.* 48 *G.* 3. 283

4. Where a neutral ship bound from *America* to *Havre* was so detained and brought into a *British* port; and pending proceedings in the Admiralty the king declared *Havre* in a state of blockade, by which the further prosecution of the voyage was prohibited; this was held a total loss of the voyage, which entitled the neutral assured to abandon. *ib.*

5. But the blockade of *Havre* having been publicly notified here on the 6th of *September*; and no notice of abandonment given till the 14th of *October*, nor any excuse substantiated for not giving it sooner for want of competent authority before, nor any authority shewn for giving it then; held that the notice was out of time; and this, though the plaintiff's agents in this country had no notice till the 17th of *October* of the decree for restoration of the ship and goods in question, which had been pronounced on the 8th of *October*. *ib.*

6. A policy of insurance originally underwritten on "ship *and outfit*" was after the ship sailed declared by consent of all parties, to be on "ship *and goods*," by a memorandum written on a blank space in the body of the policy; but without any new stamps: and it having been before decided that for want of the stamps the plaintiff could not recover as upon a policy on ship *and goods*, as declared by the memorandum, it was now held that he could not recover upon the policy in its original state, as an insurance on "ship *and outfit*," by reason of the alteration apparent upon the face of the instrument itself, and which was made by parties interested. *French* v. *Patton*, *E.* 48 *G.* 3. 351

INSURANCE OF LIFE.

A creditor may insure the life of his debtor to the extent of his debt; but such a contract is substantially a contract of indemnity against the loss of the debt; and therefore, if, after the death of the debtor, his executors pay the debt to the creditors,

ditor, the latter cannot afterwards recover upon the policy; although the debtor died insolvent, and the executors were furnished with the means of payment by a third party. *Godsall* v. *Bolders*, *M.* 48 *G.* 3. 72

JUDGMENT.

See FOREIGN JUDGMENT.

JURISDICTION.

By the long established and recognized practice of B. R. a writ of capias, with a non omittas clause, may issue in the first instance, and be executed by the sheriff within a particular liberty, (such as the honor of *Ponte fract* in the county of *York*,) the bailiff of which has the execution and return of writs, without a prior writ of latitat first issued, and a return made by the sheriff of mandavi ballivo qui nullum dedit responsum: and therefore no action on the case lies by the bailiff of such liberty against the party suing out such writ, upon an allegation that it was *wrongfully, injuriously, and deceitfully* caused to be issued by him to the damage of the bailiff's office, &c. *Carrett* v. *Smallpage*, *E.* 48 *G.* 3. 330

JUSTICE OF PEACE.

See ORDER OF JUSTICES.

One magistrate committing the mother of a bastard child to custody for not filiating the child is yet entitled to the previous notice of action required by the stat. 24 G. 3. *c.* 44., though by the stat. 18 *Eliz.* *c.* 3. *s.* 2. jurisdiction over the subject matter is given to *two* magistrates. *Weller* v. *Toke*, *E.* 48 *G.* 3. 364

LADING, BILL OF.

See BILL OF LADING.

LANDLORD AND TENANT.

After a landlord has recovered in ejectment against his tenant, he may maintain debt upon the stat. 4 *G.* 2. *c.* 28. for double the yearly value of the premises, during the time the tenant held over after the expiration of the landlord's notice to quit. *Soulsby* v. *Neving*, *H.* 48 *G.* 3. 310

LEASE.

Under a lease for 14 or 7 years the lessee only has the option of determining it at the end of the first 7 years; every doubtful grant being construed in favour of the grantee. *Doe* v. *Dixon*, *M.* 48 *G.* 3. 15

LICENCE TO TRADE WITH ENEMY.

See TRADE, 1.

LIEN.

The master of a ship has no lien on it for money expended or debts incurred by him for repairs done to it on the voyage. *Hussey* v. *Christie*, *E.* 48 G. 3. 426

LIFE INSURANCE.

See INSURANCE OF LIFE.

LONDON DOCK COMPANY.

By the construction of the statute 39 and 40 *G.* 3. *c.* 47. the *London* Dock Company are liable, even during the first 12 years of their establishment, to be rated for the fair annual value of their *warehouses* and other works which are finished and productive, though all the works directed by the act be not completed. But such completed works must under such circumstances be rated for their value at the rate of 8½*d.* in the pound; such being the rate calculated upon by the legislature to raise

139*l.*

139*l*. 8*s*. 7*d*. per quarter upon 3966*l*. the average rental for 10 years preceding the ſtatute, on the premiſes deſtroyed by the company in making their works; and which quarterly ſum the Company were at all events bound to pay to the pariſh during the 12 years, or until the works were completed, whether thoſe works were productive or not. But when productive beyond that ſum, the ſurplus is to be taken in the firſt inſtance by the Company; in order to reimburſe themſelves what they may have advanced to the pariſh, to make good the deficiencies, before any ſuch productive ſurplus exiſted, until the Company ſhall be reimburſed. Therefore until theſe purpoſes are effected, a rate made on the increaſed real value of the Dock premiſes at more than 8½*d*. in the pound, or a rate of 8¼*d*. in the pound on the old average value of the premiſes before the erection of the Company's works, and below the increaſed value of the new works, is in either caſe bad. *The King* v. *The Inhabitants of St. George, Middleſex*, *M*. 48 *G*. 3. 127

LONDON.

It does not appear that the freemen and liverymen of *London* are exempted from being impreſſed for the ſea ſervice, if in other reſpects fit ſubjects for that ſervice. *The King* v. *Young*, *E*. 48 *G*. 3. 466

MALICIOUS PROSECUTION.

1. In an action on the caſe for a malicious proſecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, ſo that it appears to have been before the action brought; and therefore a variance in that reſpect between the day laid and the day ſtated in the record, which was produced to prove the acquittal, is not material; the day not being laid in the declaration as part of the deſcription of ſuch record of acquittal. *Purcell* v. *Macnamara*, *M*. 48 *G*. 3. 157

2. It lies on the plaintiff in an action for a malicious proſecution to give evidence of malice in the defendant, either expreſs or to be collected from circumſtances ſhewing plainly the want of probable cauſe; and the malice is not to be implied from the mere proof of the plaintiff's acquittal for want of the proſecutor's appearing when called. *Purcell* v. *Macnamara*, *E*. 48 *G*. 3. 361

MANDAMUS.

See CORPORATION, 1. SEWERS, 1.

MARRIAGE, RESTRAINT OF.

J. P. deviſed real and perſonal eſtate to truſtees to pay thereout an annuity to his wife for life, and out of the reſidue to pay ſufficient for the maintenance, education, and ſupport of his only daughter *until ſhe ſhould attain the age of* 21 *years, or marry*; and when ſhe ſhould attain 21, or marry, then to her in fee: but in caſe his daughter ſhould die under age and unmarried, then the eſtates to go to his wife for life; and, after her deceaſe, *to the two children of his nephew*, as tenants in common in fee: with a proviſo, that if either his wife or daughter ſhould *marry a Scotchman*, then his wife or daughter, ſo marrying, ſhould *forfeit* all benefit under his will, and the eſtates given to ſuch his wife or daughter as ſhould ſo marry *ſhould deſcend to ſuch perſon or perſons as would be entitled under his will in the ſame manner as if his wife or daughter were dead.* Held, that ſuch partial reſtraint of marriage was legal; and that the daughter having while under age married a *Scotchman* and died, leaving

ing a son, such son could not inherit, nor her husband be tenant by the curtesy; but that the limitation over (the testator's wife being also dead) to the two children of the testator's nephew (which nephew was still living) took effect immediately on such marriage; they being the persons designated by the will to take in the event which had happened; the testator having considered such prohibited marriage the same as the death of his daughter, under age, unmarried. *Perrin* v. *Lyon*, *M* 48 *G*. 3. 170

MASTER AND SERVANT.

See SETTLEMENT BY HIRING AND SERVICE.

MILITIA.

A captain in the militia receiving his pay and contingent allowances, before his qualification was properly authenticated, is not *executing any power* directed by the militia act of the 42 *G*. 3. *c*. 90. to be executed by captains, so as to bring him within the penalty of the 14th clause; the receipt of such pay and allowances not being provided for by that statute, even if any other than acts of military discipline were intended to be so prohibited. *Robinson* v. *Garthwaite*, *H*. 48 *G*. 3. 296

MISDEMEANOR.—*Compounding*.

See INDICTMENT.

One who had voluntarily offered to pay a sum of money for the use of the poor of the parish, in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor, which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the workhouse for the use of the poor; may at any rate countermand the application of the money before it is so applied; and may recover it back in an action for money had and received. *Taylor* v. *Lendey*, *M*. 48 *G*. 3. 49

MONEY.

See EXECUTION, 1.

NEUTRAL TRADE.

See INSURANCE, 3.

NUSANCE.

See INDICTMENT, 2.

ORDER OF JUSTICES.

In an order of filiation and maintenance the justices have no power by the stat. 18 *Eliz*. *c* 3. to direct the defendant to pay the *costs* of the parish in obtaining the order; but having in such order separated the sum to be paid for maintenance, and the sum to be paid for costs, the order was quashed as to the latter, and confirmed as to the rest of it. *The King* v. *Sweet*, *M*. 48 *G*. 3. 25

OUSTER, JUDGMENT OF.

See QUO WARRANTO, 1.

PARTNERS.

See BANKRUPT, 4.

PARTY WALL.

See BUILDING ACT.

PAYMENT OF MONEY INTO COURT.

In a special count on a policy of insurance, the risk was stated to continue until the ship was unloaded, and there were common counts: held that the premium having been paid into court generally was an admission

mission of the contract stated in the special count; and that it was not competent to the defendant to shew that the policy, by which the risk was originally made to cease after the ship was moored 24 hours in safety, was afterwards altered by the broker without the defendant's knowledge. *Andrews* v. *Palsgrave*, *H.* 48 *G.* 3. 325

PENAL ACTION.

Though a penal action be removed out of the proper county into another for trial, yet the cause of action must still be proved to have happened within the proper county where the venue is laid. *Robinson* v. *Garthwaite*, *H.* 48 *G.* 3. 296

PLEADING.

See MALICIOUS PROSECUTION, 1.

1. Where new matter introduced by an innuendo, without any antecedent colloquium to which it can refer to support it, is not necessary to sustain an action of slander, it may be rejected as surplusage. And therefore an innuendo, that *the Attorney-General* spoken of meant the Attorney-General for the county palatine of *Chester*, was so rejected. *Roberts* v. *Camden*, *M.* 48 *G.* 3. 93

Vid. SLANDER, 1.

2. Where a plea of justification in trespass for taking two horses as heriots, stated a custom in the manor that the lord *from time immemorial, until the division* of a certain tenement into moieties, had taken and been accustomed to take a heriot upon the death of every tenant dying seised; and *since the division* the lord had taken and been *accustomed* to take on the death of every tenant dying seised of either of the moieties a heriot for each moiety: this must be taken to be one entire custom, and not two distinct customs; the one applicable to the tenement *before*, and the other *after* the division of it: and being laid to be an *immemorial* custom, it is disproved by evidence that the division was made within memory. *Kingsmill, Bart.* v. *Bull*, *H.* 48 *G.* 3. 185

3. To debt on bond conditioned for the payment of a sum of money, which the condition stated to have been *taken up, borrowed, and received* by the defendants of the plaintiffs at respondentia interest, secured by a cargo of goods shipped from *Calcutta* to *Ostend*, it is competent to the defendant to plead that the bond was given to secure the price of goods sold by the plaintiffs to the defendants in the *East Indies*, and illegally prepared by the plaintiffs for shipment from thence to beyond the *Cape of Good Hope*, without the licence of the *East India* Company; without proceeding to state formally, that the condition was colourable, to conceal the illegality of the transaction, and to negative that the bond was given for money *taken up, borrowed, and received*, &c. For the statement in the plea is rather explanatory of, than absolutely inconsistent with, the transaction stated in the condition of the bond: but if it were inconsistent with it, the plea would still be good in this form. *Paxton* v. *Popham*, *E.* 48 *G.* 3. 408

4. An officer cannot commute for money the services of an impressed man, nor let him go for money: and a bond given to secure the man's return on non-payment of such money is void, and may be avoided by plea disclosing the true transaction, and shewing that the man was illegally impressed. *Pole* v. *Harrobin*, *E.* 22 *G.* 3. *B. R.* 416

5. An attorney of *B. R.* in pleading his privilege against being sued by original, improperly stated the custom of this court to be not to compel its attornies to answer an original writ, *unless first forejudged from their office*, &c.

&c. (which is the custom in *C. B.* but not in this court): but held that enough appearing to sustain the plea, the custom, which had no foundation here, (of which the court would take notice) might be rejected as surplusage. *Stokes* v. *Mayon*, *E.* 48 *G.* 3. 424

6. The stat. 32 *G* 3. *c.* 58. *s.* 1., enabling defendants in quo warranto to plead double, is, as well as the stat. 9 *Ann*, *c.* 20, confined to *corporate* officers. *The King* v. *Richardson*, *E.* 48 G. 3. 469

POOR APPEAL.

See APPEAL.

POOR-RATE.

By the construction of the statute 39 and 40 *G.* 3. *c.* 47 the *London* Dock Company are liable, even during the first 12 years of their establishment, to be rated for the fair annual value of their *warehouses* and other works which are finished and productive, though all the works directed by the act be not completed. But such completed works must under such circumstances be rated for their value at the rate of 8½*d.* in the pound; such being the rate calculated upon by the legislature to raise 139*l.* 8*s.* 7*d.* per quarter upon 3966*l.* the average rental for 10 years preceding the statute, on the premises destroyed by the company in making their works; and which quarterly sum the Company were at all events bound to pay to the parish during the 12 years, or until the works were completed, whether those works were productive or not. But when productive beyond that sum, the surplus is to be taken in the first instance by the Company; in order to reimburse themselves what they may have advanced to the parish, to make good the deficiencies, before any such productive surplus existed, until the Company shall be reimbursed. Therefore until these purposes are effected, a rate made on the increased real value of the Dock premises at more than 8½*d.* in the pound, or a rate of 8½*d.* in the pound on the old average value of the premises before the erection of the Company's works, and below the increased value of the new works, is in either case bad. *The King* v. *The Inhabitants of St. George, Middlesex*, *M.* 48 *G.* 3. 127

2. Payment by one who was assessed to a church rate upon *householders* only, and not upon the parishioners at large, will nevertheless gain him a settlement; for it is not less a *public* tax, because laid too narrowly; and it is *charged* and *paid* within the parish, which is all that is required by the stat. 3 *W.* 3. *c.* 11. *s.* 6. *The King* v. *The Inhabitants of St. Bees*, *H.* 48 *G.* 3. 203

POOR-REMOVAL.

1. By the stat. 35 *G.* 3. *c.* 101. *s.* 2. the party aggrieved by an order of Justices, directing payment, to the amount of above 20*l.* of the charges and costs of the suspension of an order of removal, on account of the illness of the pauper, may appeal to the next sessions, in like manner as against an order of removal, though he omit to give notice of such his appeal within three days after the demand of such charges and costs; by which he makes himself liable to a distress for the amount. And if on appeal the former order be vacated, or the amount of the charges to be paid be reduced, the surplus, if before levied by distress, must be refunded. *The King* v. *The Inhabitants of Bradford*, *M.* 48 *G.* 3. 97

2. Under the stat. 35 *G.* 3. *c.* 101. *s.* 2. an order of justices, suspending their order made for the removal of a pauper to his place of settlement, on

on account of ficknefs, may be made, though he were not *brought before the juftices* at the time of fuch orders made: the plain intent and precife object of the ftatute being to extend the power of fufpenfion to all cafes where orders of removal may be made; and orders of removal may be made though the paupers to be removed be not brought perfonally before the magiftrates; however fit that is to be done where it may be done. *The King* v. *The Inhabitants of Everdon*, *M.* 48 *G.* 3. 101

3. A married woman pregnant in the abfence of her hufband with a child, which when born would by law be a baftard, is removeable as an unmarried woman under fect. 6. of ftat. 35 *G.* 3. *c.* 101.; and the prefumption of her being chargeable arifes by the fame claufe from the bare fact of being with child of a baftard, if no circumftances be ftated to fhew that fuch prefumption is not applicable to a perfon in the particular fituation of the party coming within the general defcription of the claufe. And the order of removal may charge fuch a perfon generally as *actually chargeable*, without fetting forth in what manner chargeable. *The King* v. *The Inhabitants of Tibbenham*, *E.* 48 *G.* 3. 388

4. An order of removal founded on the ftat. 35 *G.* 3. *c.* 101. *f.* 6. ftating that *A. E. fingle* woman was "*by being pregnant deemed to have become chargeable*," &c. is good. *The King* v. *The Inhabitants of Diddlebury*, *E.* 48 *G.* 3. 393

PRACTICE.

1. The court will not order the fheriff to retain, in fatisfaction of a prefent writ of fi. fa. iffued by the plaintiff againft the defendant, *money* or *bank notes*, which the fheriff had before received for the ufe of the defendant, in difcharge of an execution levied by the defendant againft another, and which the fheriff had not paid over. *Knight* v. *Criddle*, *M.* 48 *G.* 3. 48

2. A day-rule, when made, covers by relation back the liberation of a prifoner who had figned the petition, but had gone out of the prifon before the fitting of the court on the fame day; though the marfhal were fued for the efcape before the fitting of the court. *Field* v. *Jones*, *Marfhal of K. B. Prifon*, *M.* 48 *G.* 3. 151

3. A prifoner under criminal procefs in the houfe of correction cannot be brought up by habeas corpus ad refpondendum, for the purpofe of being charged with a declaration on a bailable writ, and re-committed to his former cuftody fo charged: for the court have no power to make a gaoler of fuch prifon liable for the efcape of a prifoner on civil procefs. *Brandon* v. *Davis*, *M.* 48 *G.* 3. 154

Alter in the cafe of a fheriff or gaoler of the court. *ibid.*

4. Order to amend writs of fcire facias on a judgment, and declaration thereon, conformably to the judgment roll. *Brafwell* v. *Jeco*, *H.* 48 *G.* 3. 316

5. The fheriff cannot relieve himfelf from an attachment for not bringing in the body, by payment of the debt fworn to and indorfed on the bailable writ fince the ftat. 43 *G.* 3. *c.* 46. *f.* 2., having neglected to take the money at the time of the arreft as directed by that act; but muft pay the whole debt and cofts. *The King* v. *The Sheriff of London*, *H.* 48 *G.* 3. 316

6. The court would not ftay judgment and execution, on a fummary application, becaufe the plaintiffs after verdict became alien enemies. *Vanbrynen* v. *Wilfon*, *H.* 48 *G.* 3. 321

7. None can be held to fpecial bail in trover or detinue, without a judge's order. *Reg. Gen. H.* 48 *G.* 3. 325

 8. By

8. By the long established and recognized practice of *B. R.* a writ of capias, with a non omittas clause, may issue in the first instance, and be executed by the sheriff within a particular liberty, (such as the honor of *Pontefract* in the county of *York*,) the bailiff of which has the execution and return of writs, without a prior writ of latitat first issued, and a return made by the sheriff of mandavi ballivo qui nullum dedit responsum: and therefore no action on the case lies by the bailiff of such liberty against the party suing out such writ, upon an allegation that it was *wrongfully, injuriously, and deceitfully* caused to be issued by him, to the damage of the bailiff's office, &c. *Carrett* v. *Smallpage*, *E.* 48 *G.* 3. 330

9. Bail above having been put in, and exception entered in the vacation, notice of justification for the first day of the next term must be given *within four days after such exception*. *Millson* v. *King*, *E.* 48 *G.* 3. 434

10. Where the rule for an attachment against the sheriff for not bringing in the body was obtained on the 11th of *February*, which attachment was returnable on the 4th of *May*, and the plaintiff did not issue the attachment till the 3d of *May*, and in the mean time the defendant became bankrupt on the 19th *March*, by which means the sheriff lost his opportunity of paying the debt and proving it under the commission; the attachment was set aside for such laches. *The King* v. *The Sheriff of Surry*, *E.* 48 *G.* 3. 467

11. The statute 32 *G.* 3. *c.* 58. *s.* 1 enabling defendants in quo warranto to plead double is, as well as the stat 9 *Ann.* *c.* 20. confined to corporate officers. *The King* v. *Richardson*, *E.* 48 *G.* 3. 469

12. A feme covert living apart from her husband, under sentence of separation, with alimony allowed, pendente lite, in the ecclesiastical court, having brought trespass in the name of her husband against wrong doers for breaking and entering her house and taking her goods, the Court refused on the application of such defendants to stay the action, though supported by an affidavit of the husband (who had not released the action, nor applied to be indemnified against the risk of costs,) that the action was brought without his authority. *Chambers* v. *Donaldson*, *E.* 48 *G.* 3. 471

13. The *English* notice required by the stat. 5 *G.* 2. *c.* 27. *s.* 4. is to be on the copy of the process, and not on the writ itself: and the service of such copy without the notice is irregular and will be set aside; though the court discharged a rule for quashing the writ itself on this account. *Lloyd* v. *Maurice*, *E.* 48 *G.* 3. 528

PRISONER.

See Escape.

1. A prisoner under criminal process in the house of correction cannot be brought up by habeas corpus ad respondendum, for the purpose of being charged with a declaration on a bailable writ, and re-committed to his former custody so charged: for the court have no power to make the gaoler of such prisons liable for the escape of a prisoner under civil process. *Brandon* v. *Davis*, *M.* 48 *G* 3. 154

2. Aliter in the case of a sheriff or gaoler of the court. *ib.*

PROMOTIONS.

1. In *Hilary* vacation Mr. Justice *Rooke*, of C. B. died; and was succeeded by Mr. Justice *Lawrence*, who resigned his seat on the bench of *B. R.* And in *Easter* term *John*

Bayley,

Bayley, Esq. serjeant at law, was appointed a judge of this Court, and knighted. 329

2. In *Trinity* term Messrs. *Manley*, *Pell.* and *Rough*, were called serjeants, and took for their motto "Pro rege et lege." 529

PROTEST,

See CORPORATION, 1.

QUO WARRANTO,

See CORPORATION.

1. Quære, Whether, if it be found against a defendant in quo warranto, that, though duly elected, he was not duly sworn in, there can be any other judgment against him than of *ouster absolute*; there being no instance of a judgment of ouster quousque. *The King* v. *Courtenay*, *H.* 48 *G.* 3. 246

2. The stat. 32 *G.* 3. *c.* 58. *s.* 1., enabling defendants in quo warranto to plead double, is, as well as the stat. 9 *Ann.* *c.* 20., confined to corporate officers. *The King* v. *Richardson*, *E.* 48 *G.* 3. 469

RECORD.

See VARIANCE, 1.

RENT DOUBLE.

See LANDLORD AND TENANT, 1.

SCIRE FACIAS, WRIT OF.

See AMENDMENT, 1.

SETTLEMENT.

See CONVEYANCE.

SETTLEMENT—*By Apprenticeship.*

An indenture binding an adult as an apprentice, which was not executed by herself, but only by her father-in-law and the master, though with her consent, does not constitute her an apprentice; and consequently no settlement can be gained by her under such indenture. *The King* v. *The Inhabitants of Ripon*, *H.* 48 *G.* 3. 295

—*By Hiring and Service.*

1. A deserter from the King's marine service cannot gain a settlement under a hiring and service for a year; not being sui juris, nor competent *lawfully* to *hire* himself within the stat. 3. *W.* and *M.* *c.* 11. *s.* 7. *The King* v. *The Inhabitants of Norton*, *H.* 48 *G.* 3. 206

2. A poor boy sent out of the house of industry at 14 years of age to the parish officers, and by them *allotted* to a parishioner, who handed him over to another person, by whom the boy was told that he was to stay with them a year, and should have clothes, &c.; to which the boy made no objection; conceiving himself obliged to accept the service; but made no agreement for wages, or concerning the nature or duration of his service, nor was consulted upon the subject; does not gain a settlement by serving under this supposed obligation for a year; for neither did he consider himself, nor was he considered by the other parties, as a free agent; and such only can contract, or adopt a contract made by others. *The King* v. *The Inhabitants of Stow-Market*, *H.* 48 *G.* 3. 211

—*By Rating.*

Payment by one who was assessed to a church rate upon *householders* only, and not upon the parishioners at large, will nevertheless gain him a settlement; for it is not less a *public* tax because laid too narrowly; and it is *charged* and *paid* within the parish, which is all that is required by the stat. 3 *W.* 3. *c.* 11. *s.* 6. *The King* v. *The Inhabitants of St. Bees*, *H.* 48 *G.* 3. 203

SEW-

SEWERS.

The ſtat. 23 *H* 8. *c* 5. *ſ.* 17. having directed that "*Laws, acts, decrees, and ordinances*" made by commiſſioners of ſewers ſhall ſtand good and be put in execution *ſo long time as their commiſſion endureth, and no longer*, except "the ſaid laws and ordinances" be engroſſed in parchment, and certified under the ſeals of the commiſſioners into Chancery, and have the royal aſſent: and the ſtat. 13 *Eliz. c.* 9 having directed all commiſſions of ſewers to continue in force for 10 years, unleſs ſooner determined by ſuperſedeas or any new commiſſion; and that all *laws, ordinances, and conſtitutions*," made by force of ſuch commiſſion, *being written in parchment, indented and under ſeals*, &c., ſhall, without ſuch certificate or royal aſſent, continue in force notwithſtanding the determination of the commiſſion by ſuperſedeas, until repealed or altered by new commiſſioners; and that all ſuch *laws, ordinances, and conſtitutions*, written *in parchment, indented, and ſealed, &c.* ſhall, without certificate or royal aſſent, continue in force *for one year* after the expiration of ſuch commiſſion by lapſe of 10 years from its teſte; held,

1. That the *laws, acts, decrees, and ordinances*, mentioned in the ſtat. of *Hen.* 8. mean the ſame as the *laws, ordinances, and conſtitutions*, mentioned in that of *Elizabeth*. And,

2. That a *decree* made by commiſſioners under a former commiſſion which had expired by lapſe of 10 years, directing a ſea wall to be refounded, which had been deſtroyed by a violent tempeſt and inundation, and the ſums neceſſary for its conſtruction to be advanced by thoſe who were before bound to ſuſtain it ratione tenuræ, (and who did advance the money accordingly) and that a rate ſhould be made on the level for their reimburſement; (although ſuch decree had been written in *parchment, indented, and ſealed*; which this was not,) could not be enforced by commiſſioners under a *new* commiſſion, iſſued more than a year after the expiration of the former commiſſion; as to ſo much of it as remained unexecuted: though good to the extent to which it had been executed: and therefore this Court refuſed a mandamus to the new commiſſioners to direct a rate to be levied on the level for the reimburſement directed by the decree. *The King* v. *The Commiſſioners of Sewers, Somerſet, M.* 48 *G.* 3. 109

SHERIFF.

In an action on the caſe againſt the ſheriff for negligent and wrongful conduct in conducting the ſale of the plaintiff's goods under a writ of fieri facias, by which they were ſold much under value, where, in ſtating the ſubſtance of the writ, the count alleged that the ſheriff was commanded to levy 80*s.* awarded to *J. C.* for his *damages* ſuſtained *by occaſion of the detaining the debt*; that is proved by the writ which ſtated that the 80*s.* were awarded to *J. C.* for his *damages* ſuſtained *as well* by reaſon of *detaining the debt* as for his *coſts*, &c.; for *coſts* are in legal ſenſe included in the word damages. *Phillips* v. *Bacon, H.* 48 *G.* 3. 298

SHIP.

The maſter of a ſhip has no lien on it for money expended or debts incurred by him for repairs done to it on the voyage. *Huſſey* v. *Chriſtie, E.* 48 *G.* 3. 426

SLANDER.

1. 1. The rule of conſtruction as to ſlanderous words is to conſtrue them in their plain and proper ſenſe, ſuch in which an ordinary hearer would have underſtood them at the time they were ſpoken. And therefore the

the defendant saying of the plaintiff that "he was under a charge of a "prosecution for perjury; and that "*G. W.* (an attorney of that name) "had *the Attorney-General's* directions to prosecute the plaintiff *for* "*perjury*," is actionable. For after verdict (by which the jury, who are to judge of the intent of the speaker, must be taken to have negatived that he meant to speak of a prosecution for a perjury which the plaintiff had *not* committed,) the words, not having been justified, must be taken to be *false*; and being unqualified by any context, and unexplained by any occasion to warrant them, the law infers *malice* from the *falsehood* of an accusation which, in the common acceptation of the words, impute *perjury* to the plaintiff. *Roberts* v. *Camden*, *M.* 48 *G.* 3. 93

2. Where new matter introduced by an innuendo, without any antecedent colloquium to which it can refer to support it, is not necessary to sustain the action, it may be rejected as surplusage. And therefore an innuendo, that *the Attorney-General* spoken of meant the Attorney-General for the county Palatine of *Chester*, was so rejected. *ib.*

SOLDIER.

See Settlement by Hiring and Service, 1.

STAKE HOLDER.

Where money in litigation between two parties has by mutual consent been paid over to a trustee, in trust for the party entitled, it can only be sued for and recovered from the stakeholder by the party entitled to it, and not from the original party who was indebted; though he agreed to wave all objections to form. *Ker* v. *Osborne*, *E.* 48 *G.* 3. 378

STAMPS.

1. *A.* and *B.* having exchanged their acceptances of bills drawn by each on the other at so many day's date; held that the delivery of the respective bills for acceptance, and the re-delivery of the same by the acceptors to the respective drawers, was a negotiation of the bills; and that such bills could not, after they had been so exchanged for valuable consideration (as the exchange of acceptances is) for 20 days, be post-dated without a new stamp, as upon new bills; although during all that time each had remained in the hands of the original drawer. *Cardwell* v. *Martin*, *H.* 48 *G.* 3. 190

2. A policy of insurance originally underwritten on "ship *and outfit*" was after the ship sailed declared by consent of all parties, to be on "ship *and goods*," by a memorandum written on a blank space in the body of the policy; but without any new stamps: and it having been before decided that for want of the stamp the plaintiff could not recover as upon a policy on ship *and goods*, as declared by the memorandum, it was now held that he could not recover upon the policy in its original state, as an insurance on "ship *and outfit*," by reason of the alteration apparent upon the face of the instrument itself, and which was made by parties interested. *French* v. *Patton*, *E.* 48 *G.* 3. 351

STATUTES.

A statute introductive of a new qualification as to the subject matter, though penned in the affirmative, repeals a former statute concerning the same matter. Therefore the stat. 13 *G.* 2. *c.* 28. *s.* 5., exempting from the impress service any harpooner, &c. *seaman*, &c. in the *Greenland* trade, is impliedly repealed by

STOCK TRANSFERRABLE SCHEMES.

See INDICTMENT, 2.

SUBPŒNA.

SUBPŒNA DUCES TECUM.

The writ of ſubpœna duces tecum is of compulſory obligation on a witneſs to produce papers thereby demanded which he has in his poſſeſſion, and which he has no lawful or reaſonable excuſe for withholding; of the validity of which excuſe the Court, and not the witneſs, is to judge. And in an action againſt a ſheriff's bailiff for diſobeying ſuch writ, who having been ſubpœnaed, on a former action by the plaintiff againſt another, to produce the warrant under which he acted, had neglected ſo to do, whereby the plaintiff was nonſuited; his ability to produce the warrant and his want of juſt excuſe for not producing it are ſufficiently alleged by ſtating, that he could and might in obedience to the ſaid writ of ſubpœna have produced at the trial the ſaid warrant, and that he had no lawful or reaſonable excuſe or impediment to the contrary. *Amey* v. *Long*, *E.* 48 *G.* 3. 473

SURPLUSAGE.

Where new matter introduced by an innuendo, without any antecedent colloquium to which it can refer to ſupport it, is not neceſſary to ſuſtain an action for ſlander, it may be rejected as ſurpluſage. And therefore an innuendo that *the Attorney General* ſpoken of meant the Attorney-General for the county palatine of *Cheſter*, was ſo rejected. *Roberts* v. *Camden*, *M.* 48 *G.* 3. 93

SURRENDER.

John Lealand ſurrendered a copyhold in the occupation of him, *John Lealand*, to the uſe of *Joſeph* Lealand and *John* Lealand *his ſon*, for their lives and the life of the ſurvivor; remainder to the heirs of the body of the *ſaid John* Lealand *ſon of Joſeph* L.; remainder to the right heirs of *the ſaid* John Lealand: held, that the ultimate remainder was meant for the right heirs of *John the ſurrenderor*; as well becauſe *John the ſurrenderee* is before deſcribed with the addition of *the ſon of Joſeph*; as of the manifeſt futility of giving *John the ſurrenderee* an eſtate *tail*, and afterwards a *fee* in ſucceſſion. Though if the conſtruction had even been left doubtful, the ultimate remainder would have continued in the ſurrenderor. *Roe d. Hucknall* v. *Foſter*, *E.* 48 *G.* 3. 405

TENANT,

See Landlord and tenant.

TRADE.

See Impress, 1. Insurance, 3. Indictment, 2.

The ſtat. 43 *G.* 3. *c.* 153. *ſ.* 15. having enabled the king by order in council to licenſe the importation of certain goods, being *Britiſh* or neutral property, from the enemy's country, in neutral ſhips; a contract made by *A.* and *B. Britiſh* ſubjects, (the plaintiffs) for the purchaſe of brandy from a houſe of trade in *France* (an enemy,) to be ſhipped from thence in a neutral, on account of *A.* and *B.*; which contract was made *in contemplation of obtaining a licence* for that purpoſe; which licence was accordingly obtained ſoon after the making of ſuch contract, and before it was begun to be executed; is a legal contract, and may lawfully be guarantied in the firſt inſtance by *C.* and *D.* other *Britiſh* ſubjects (the defendants). And after ſuch licence obtained, the guarantees are liable in damages for the nonſhipment of the goods by the houſe in *France* on board a neutral ſent there for that purpoſe. Though it were objected

objected to the licence legalizing such trade, that it was not made out to *A.* and *B.* *by name*, but only to *C.* and *D.* and *other British merchants*; and that neither *C.* and *D.*, nor even *A.* and *B.*, had any property in the goods; whereas the licence required the goods to be imported to be *the property of the said persons or some of them*; and, until shipment, the property continued in the house in *France*. For neither the act of parliament, nor the king's licence, required the owners of the property to be *individually named*; and even if the licence were to be so construed, as it only required the goods imported to be the property of "the "said persons or some of them, *as "may be specified in their bills of lading*;" and as no bills of lading were made out, which might have been made in the names of *C.* and *D.*, and if so, would have conveyed to them a legal or special property in the goods; the defendants *C.* and *D.* were still liable to answer in damages, upon their guarantie, as for the non-performance of a legal contract. *Timson* v. *Merac, M.* 48 *G.* 3. 35

TRESPASS.

See Pleading, 2.

One magistrate committing the mother of a bastard child to custody for not filiating the child is yet entitled to the previous notice of action required by the stat. 24 *G.* 3. *c.* 44., though by the stat. 18 *Eliz.* *c.* 3. *s.* 2. jurisdiction over the subject matter is given to *two* magistrates. *Weller* v. *Toke, E.* 48 *G.* 3. 364

VALUE OF PREMISES UNDER COMPENSATION ACT.

See West India Docks.

VARIANCE.

See Damages and Costs, 1.

1. In an action on the case for a malicious prosecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to have been before the action brought: and therefore a variance in that respect between the day laid and the day stated in the record, which was produced to prove the acquittal, is not material; the day not being laid in the declaration as part of the description of such record of acquittal. *Purcell* v. *Macnamara, M.* 48 *G.* 3. 157
2. A variance in setting out one of several covenants in a lease, on which breaches were assigned, viz. the *Cellar-beer* field, instead of the *Aller-beer* field, being considered as part of the description of the deed declared on; though the plaintiff waved going for damages on the breach of that covenant; is fatal. *Pitt* v. *Green, H.* 48 *G.* 3. 188
3. Proof that the defendant agreed to sell his horse warranted sound to the plaintiff for 31*l.* 10*s.*, and at the same time agreed that if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for 14*l.* 14*s.*, and that the difference only should be paid to the defendant, will support a count charging only, that in consideration that the plaintiff would buy of the defendant a horse for 31*l.* 10*s.* the defendant promised that it was sound; and that in fact the plaintiff did buy the horse *for that price*, and *did pay to the defendant the said* 31*l.* 10*s.* *Hands* v. *Burton, E.* 48 *G.* 3. 349

VOLUNTARY CONVEYANCE.

See Conveyance Voluntary.

WEST INDIA DOCKS.

The compensation clause, *f.* 121. of the stat. 39 *G.* 3. *c.* 69. directing that in case any warehouses, &c. (used for holding *West India* produce before that act) should be rendered *less valuable* by reason of the *West India* trade being diverted therefrom by the then intended *West India* docks and works, than they were *before the passing of the act*; or in case the *yearly* or *other receipts* of *Christ's* hospital should be thereby lessened; the owners of such warehouses, &c. and the governors of the hospital should be compensated; (thereby putting such owners, and governors on the same footing) must be construed with reference to the *yearly* profits made of the premises *antecedent* to the passing of the act; and the *value* of such warehouses cannot be evidenced by the yearly profits made between the passing of the act and the opening of the docks, by which latter the loss was occasioned. *Manning* v. *Commissioners of Compensation under the West India Dock act*, *M.* 48 *G.* 3. 165

END OF THE NINTH VOLUME.

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